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REMEDIES
AND
REMEDIAL RIGHTS

BY
THE CIVIL ACTION,
ACCORDING TO
THE REFORMED AMERICAN PROCEDURE.

A TREATISE
ADAPTED TO USE IN ALL THE STATES AND TERRITORIES
WHERE THAT SYSTEM PREVAILS.

BY
JOHN NORTON POMEROY, LL.D.,
AUTHOR OF "AN INTRODUCTION TO MUNICIPAL LAW," "AN INTRODUCTION
TO CONSTITUTIONAL LAW," ETC., ETC.

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TO

AARON J. VANDERPOEL, Esq.,

OF THE NEW YORK BAR,

**THIS BOOK IS INSCRIBED ALIKE AS A TRIBUTE TO HIS HIGH PROFESSIONAL
CHARACTER, AND AS AN EXPRESSION OF THE AUTHOR'S
PERSONAL REGARD.**

P R E F A C E.

THE new procedure which was devised by the codifiers and inaugurated by the Legislature of New York, in the year 1848, now prevails in more than twenty other States and Territories of this country, and may, therefore, be properly termed "The Reformed American System of Procedure." After a most careful consideration, and the most cautious and deliberate examination by a commission composed of the ablest judges and barristers, it has finally been accepted in its essential features and elements by the British Parliament, and has recently displaced the time-honored methods of the common-law and the equity courts in England. This fact alone may be regarded as decisive of its intrinsic excellence, as conclusively demonstrating that it is founded upon natural and true principles; that it embodies rational notions in respect to the manner of conducting judicial controversies between private litigants; and that, in its conception and design, it is far superior to the artificial, technical, and arbitrary modes which had so long been looked upon as perfect by generations of English and American lawyers. It is shown in the Introductory Chapter of the present work that this whole course of reform is but a repetition, not simply in a general outline, but even in the minute details, of what took place in the jurisprudence of Rome; so that the modern legislation has, in this respect, merely followed an inevitable law of progress, which always works out the same results under the same social conditions and circumstances.

Although the codes which have been enacted in the various States and Territories sometimes differ slightly from each other in respect to the minor measures and steps of practice, and although some of them, in reference to certain special matters, have

more freely carried out the original and underlying theory to its logical results, and have by distinct provisions expressly abrogated particular dogmas of the old law, which in other States are only included in the general language of the statute, and are thus left within the domain of judicial construction, yet in all its essential notions and fundamental doctrines the reformed procedure is one and the same wherever it prevails, either in the United States or in England. The "Civil Action" which it has created and introduced as the single and sufficient instrument for the trial of all judicial controversies between private suitors and for the pursuit of all judicial remedies is the same in conception, in form, and in substance, possessing the same characteristic features, governed by the same elementary rules, and embodying the same organic principles. How completely the reformed system is severed from the ancient common-law modes, how entirely it abandons all the arbitrary, formal, and technical notions which were their very essence and life, and how firmly it rests upon natural and necessary facts as its foundations, is shown in the Introductory Chapter and in other portions of this work. It is impossible, therefore, that its full benefits can be attained, and that full scope can be given to its original purpose, until the courts and the profession shall accept it in its simplicity, and shall cease to obstruct its efficient operation and to interrupt its free movements by antiquated dogmas and rejected doctrines drawn from the system which it has thoroughly overthrown and supplanted.

The design of the author is to present the entire remedial department of the law—the remedies and remedial rights—according to the reformed procedure. The volume now submitted to the profession, although in itself a complete and independent work, accomplishes a part of this full purpose. It treats of the "Civil Action," which is the central fact of the new procedure, and which, as has been said, is everywhere the same in all its distinctive features and elements. It is not a treatise upon "Practice;" but it discusses in a thoroughly practical manner those features and elements which constitute the Civil Action, and which differentiate that judicial proceeding from the action

at law and the suit in equity. The discussions and conclusions which it contains are not theoretical; they are everywhere and always based upon an exhaustive examination, analysis, and comparison of the decided cases: and the author has freely drawn upon the judicial decisions of the States, and by this means presents to the reader a body of authority which fully indicates the action of the courts and their theories and modes of interpretation throughout the commonwealths in which the system prevails. Although it cannot be pretended that every case referring to the Civil Action has been cited, — in fact, many of them are unworthy of citation, since they are the reflections of crude and incorrect opinions long since rejected, while others are the mere repetitions of points already well settled, — yet it is believed that none are omitted which contain the statement of a new and correct principle. The author has endeavored to collect all the leading cases in every State, — all those which have been finally accepted as authoritative, and which represent the mature thought and convictions of the judiciary; and in no other work can be found such a mass of judicial opinion gathered from courts of the various States, giving a construction to the statutory provisions which describe the Civil Action, and building up an harmonious and consistent system of procedure upon the reform legislation. While the author has everywhere endeavored to reach the true principles of interpretation, and to extract from the cases a statement of universal doctrines which shall aid in the solution of all future questions, and has not scrupled to express his own views and opinions, such speculations and arguments are always plainly indicated and represented in their real character, so that the reader need never confound them with the results of actual judicial decision, and be thus led to accept as settled law what is only a personal conviction or suggestion of the author.

While the work is thus intended to be a practical handbook for the lawyer, as an aid in the every-day duties of his profession, it is hoped that its use may tend to bring the procedures of the different States into closer relations, and may finally produce the perfect identity of method and form which is possible from the

legislation itself, and which was, beyond doubt, the design of the several legislatures in adopting the reform. Such an identity is entirely practicable, and the full beneficial results of the change will not be attained until it is reached. In every State there has accumulated a growing amount of judicial interpretation which would be of the greatest assistance to the Bench and Bar of all the other States; and in several of them certain special rules and methods have been wrought out and finally established, which need only to be known in order to be universally followed. Such a reform, founded on the nature of things, and not upon artificial and arbitrary assumptions, never goes backward; and the time will surely come when the system that has already spread so widely will be introduced into every commonwealth, and when the distinction between legal and equitable modes of pursuing remedies will disappear, and finally be forgotten.

The central conception of the reformed procedure, and the one from which all the elements of the Civil Action are developed, is the abolition of the distinction between legal and equitable suits, and the substitution of one judicial instrument, by which both legal and equitable remedies may be obtained, either singly or in combination. The full scope and effect of this grand principle are exhaustively discussed in the opening chapter, while the necessary limitations upon its operation which inhere in our judicial institutions are also carefully pointed out. Having thus laid the foundation upon which the whole superstructure rests, the remaining parts of the Civil Action are examined in turn, and the practical rules which control their use are minutely explained in the light of judicial authority. These general features are the parties to the Civil Action, plaintiff and defendant, the presentation of the cause of action by the plaintiff, and of the defence or claim of affirmative relief by the defendant. The two latter divisions include, among other important particulars, the principles of the reformed pleading; the scope and effect of the general denial, with the defences which may be proved under it; the nature and object of specific denials; the answer of new matter, and the defences which must be specially pleaded; and the counterclaim. The discussion of these special topics, being of the

greatest practical importance, has been purposely made very full and minute. An attempt has also been made to obtain, in a general and complete form, the true meaning of certain phrases found in all the codes, upon which the interpretation of most important provisions, and the practical rules resulting therefrom, so closely depend. Among the statutory phrases are "the cause of action," "the subject of action," "transaction," "causes of action arising out of the same transaction," and the like. If the author has succeeded in ascertaining the true meaning of these and similar expressions, and the legislative intent in their use, he is confident that he will have rendered a substantial aid to the profession, and even to the courts, in the difficult work of statutory interpretation. The treatise, as a whole, if its purpose has been properly carried out, will be a practical handbook, adapted to the use of the profession in every State and Territory where the reformed procedure prevails. It is also designed as a text-book for students, whether in offices or in law schools; and to that end frequent reference has been made to the common-law and equity systems of procedure, in explanation of their more general doctrines and principles, and in comparing them with those which have been substituted in their place. If its reception by the Bar shall be favorable, the author's original design will be completed by a second, but entirely distinct and independent, volume, which will treat of the remedies and remedial rights that may be obtained and enforced by means of the Civil Action, their nature and classification, and the particular rules and doctrines which regulate the employment of the action in their pursuit.

JOHN NORTON POMEROY.

ROCHESTER, N. Y., December, 1875.

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CIVIL REMEDIES.

CIVIL REMEDIES.

INTRODUCTORY CHAPTER.

§ 1. By far the greater portion of any actual system of jurisprudence consists of commands that create and define those rights and corresponding duties which control the normal relations of individuals with each other and with the body politic of which they are members. Some of these rights and their corresponding duties govern the relations alone of the state with individuals, and are properly termed *public*; the others are confined to the relations of individuals with each other, and are called *private*. As these rights and duties form the very substratum of the whole law, as the law and all the machinery of administration exist solely to declare and enforce them, as they are in fact the very end and object of legislation and government, they may be and are by most juridical writers appropriately styled *primary rights and duties*. If mankind were absolutely perfect so that disobedience would be impossible, if it were certain that every command uttered by the Supreme Power would be voluntarily obeyed by those to whom it was addressed, the law would contain nothing else than an enumeration of these primary rights and duties. Since, however, disobedience is possible, and these primary rights may be broken and duties unperformed, a supplemental branch of the law becomes a matter of necessity, by which obedience may be enforced. This secondary and supplementary department is by some writers called the "sanctioning," because it deals with the sanctions which give their compulsive efficacy to the commands of the supreme power. I shall, however, use the term *remedial* as descriptive of this department, since it

more nearly accords with the nomenclature customary among lawyers in England and in America.

§ 2. This secondary and supplementary or remedial department of jurisprudence has to do with remedies and with remedial rights and duties. *Remedies*, in their widest sense, are either the final means by which to maintain and defend primary rights and enforce primary duties, or they are the final equivalents given to an injured person in the place of his original primary rights which have been broken, and of the original primary duties towards him which have been unperformed. *Remedial rights*, or *rights of remedy*, are rights which an injured person has to avail himself of some one or more of these final means, or to obtain some one or more of these final equivalents. *Remedial duties* are secondary duties, devolving upon the party who has infringed upon the primary rights of another, and failed to perform his own primary duties towards that other, to make the reparation provided by some one or more of these final means, or furnished in some one or more of these equivalents. One or two familiar and simple examples will illustrate and explain these abstract definitions. A. and B. have entered into a contract by which the latter has agreed to sell and deliver to the former a quantity of merchandize: analyze the results of this relation. A. has the right that B. should transfer and deliver to him the goods referred to, and a corresponding duty rests upon B. to make the transfer and delivery. This right and this duty are primary. B. fails to perform, and thereupon a new secondary right in A. arises, and a new secondary duty of B. A.'s new right is to have the remedy which the law permits in such a case, and B.'s new duty is to grant this remedy; this new right and this new duty are remedial. The remedy given under such circumstances is a pecuniary compensation, a sum of money in the place of the goods, which in our legal nomenclature is termed damages. In this instance the remedy is plainly an *equivalent*. A.'s primary right was to acquire the ownership and the possession of the *corpus* of the goods; B.'s primary duty was to transfer the ownership and possession of that *corpus*. The remedy, however, is not the ownership and possession of the merchandize, but the ownership and possession of a sum of money instead thereof. It is a moral and indirect means of enforcing the primary right, because it may induce B. to perform his primary duty

and deliver the goods; but, if it does not produce that effect, it is an equivalent for the ownership and possession of the articles themselves. In this instance we have a given primary right and duty, a breach thereof by non-performance, a new remedial right and duty in the place of the primary ones, and a remedy different from but equivalent to those originals. This familiar example illustrates every case of remedy by a pecuniary compensation in the place of the primary right and duty which have been broken. Another example will be sufficient. A. and B. have entered into a contract by which the latter has agreed to convey a certain farm, and to execute and deliver a deed thereof to the former. Here A.'s primary right is to have B. convey the farm, which is done by executing and delivering the deed and by surrendering possession of the land. B.'s corresponding primary duty is to perform these acts. Upon B.'s refusal, A. is at once clothed with a new and remedial right, and B. is subjected to a new and remedial duty. Under these circumstances the law gives a remedy which is the same as the end which was to be attained by the primary right and duty themselves; that is, the conveyance of the land. In other words, the law will compel B. to do just what he in terms contracted to do,—execute and deliver the deed and surrender the possession. Here the secondary, remedial right and duty are the same as the original primary right and duty; and the remedy itself is not an equivalent to, but is identical with, the result to be reached by such primary right and duty. The remedy, however, is plainly a means by which A. maintains his primary right, and enforces the primary duty which B. owes to him, for by it the self-same right is upheld, and the self-same duty is performed.

§ 3. When the primary rights and duties are public, that is, when they govern the relations alone of the State with individuals, the remedies for the violation thereof are public, and the larger portion of them are criminal. When the primary rights and duties are private, that is, when they are confined to relations of individuals with each other, the remedies are also private, or, as they are frequently termed, civil. This treatise will deal with the latter class alone. The vast majority of public remedies are designed to preserve the good order of society, and to enforce those duties of individuals towards the State whose violations are called crimes, and the remedies themselves are

criminal: but there are other public remedies which are not in any respect criminal. . The remedies to which I now refer may, at first blush, appear to be private, and to be used to enforce some rights that belong to an individual rather than to the body politic; yet, on closer examination of their elements and objects, it will be plainly seen that they are strictly public, and serve to uphold rights which inhere in the Commonwealth. The subdivision which I am thus describing includes those judicial proceedings by which the regular organization and structure of the government are preserved by determining the conflicting claims of litigant parties to occupy and hold the powers and functions of some particular public office. The individual who is, or who claims to be, a portion of the governmental organism, by virtue of an official position which he seeks to establish, may be an actor in the judicial proceeding; but the proceeding is not instituted, nor is the determination made, on his own personal account, nor for his own private benefit; the State is in theory and in practice the party primarily interested, and the rights of the State are maintained and established by the judicial decision. On the other hand, certain remedies which have the outward appearance of being public, which are required by some ancient and arbitrary rule of form to be brought in the name of the Commonwealth or of the people, are actually private and civil. The interposition of the State as a nominal actor is merely formal, and the rights to be upheld belong to individuals in their private characters and capacities. Remedies and remedial rights of this last class, being strictly private and civil, fall within the scope of the present work, while those of the preceding class are not embraced within its design.

§ 4. I shall in this Introductory Chapter state and explain the general plan of the following treatise upon the Civil Action of the reformed American System of Procedure, and upon the Remedies which may be obtained and the remedial rights which may be secured by its means. For purposes of convenience, and to exhibit the sequence of thought in the clearest possible manner, the prefatory matter will be separated into subdivisions or sections, each embracing a single topic. As a preliminary to the purposes thus stated, a rapid sketch and general outline of the system which prevailed prior to the reformatory legislation of New York and of other States will be necessary.

SECTION FIRST.

THE REMEDIAL SYSTEM PRIOR TO THE MODERN REFORMS.

§ 5. Previous to any sweeping changes made by statute, justice was administered in England and in those States which had borrowed the English methods unaltered, by two distinct sets of courts, and by two different systems of procedure, — the legal and the equitable. All the ordinary remedies which could be granted to a party in the courts of law as distinguished from those of equity, and in fact all the ordinary remedies which the common law knew and furnished, were administered through and by means of certain fixed and well-defined forms of proceeding, known as the “common-law actions” or “actions at law.” I say all the *ordinary* remedies, because in addition to those which were thus obtained by means of the determinate actions at law, there were some others, exceptional, ancillary, and *extra-ordinary* in their nature, which were obtained by means of certain special proceedings that were not properly actions. Among these special proceedings — and they are mentioned as illustrations of my meaning only, — were the writ of *habeas corpus*, the writ of *mandamus*, and the like. The number, nature, and purposes of these various common-law actions, and of these common-law special proceedings, were fixed, and had remained unchanged for several centuries. This fact was not, however, peculiar to England and to the common law. It is found to have been a universal principle, so far as the researches of historical jurists have thrown any light upon the subject, that in the earlier and formative periods of every national jurisprudence, and subsequently until a change was effected in them by direct legislation, the civil remedies were bound up in and administered by determinate forms of judicial procedure, which, while well defined and firmly established, were highly artificial and arbitrary, and of which the common-law actions may be taken as the types. The Roman and the English systems of jurisprudence are the only ones which have passed through an entire course of development, from the rudest archaic stage to a final condition of enlightened equity and refined morality, and whose history throughout this completed progress is open for our study. The law of other coun-

tries, broken, fragmentary, and imperfect as it may have come to our knowledge, clearly shows the influence of the principle; but in that of Rome and of England it was established in its full force, and worked out its perfected results in the manner and form of the legal growth. The subject of the present section will be considered under three heads: I. The universal principle of legal development in respect to remedies and remedial rights; II. The workings of this principle in the Roman law; III. The workings of the same principle in the English law.

I. The Universal Principle of Legal Development in Respect to Remedies and Remedial Rights.

§ 6. In the very infancy of a nation, while the people with great potentialities are hardly emerged from the latter stages of barbarism, and the law is rude and severe without an element of equity or abstract justice and morality, there are found to exist a certain number of purely artificial and highly arbitrary forms of judicial procedure, which we may term actions, through which all the civil rights and duties acknowledged and provided for are protected and enforced. Their origin must be referred to the most primitive tribal customs of the peoples. These certain, fixed, and arbitrary forms are the very centre of the entire legal system; and there is hardly a general statement of primary rights and duties separate and apart from the statement of these actions and rights of action. The national code, to use a term which is very inappropriate to a law in such a shape, consists almost entirely in a description of these forms of procedure and of the strict and severe remedies which may be enforced by their means, and of the times when, occasions in which, and persons by whom, they may be used. This original shape and character of the national jurisprudence is preserved through long periods of the subsequent history. There appears to be some vital connection between these artificial and arbitrary external forms and the barbarian modes of thought, moral and religious conceptions; and only as the nation gradually works out of the barbarous into an enlightened condition does the arbitrary element of unyielding form begin to disappear, and to be replaced by simple and more just processes.

§ 7. Sir Henry Maine, in his great work, "Ancient Law," has

shown with absolute perfection of demonstration, that a national system of jurisprudence, in its progress from infancy to complete maturity, inevitably passes through three stages, or rather is developed by the means of three very different agencies, each of which, during the time when it is the ruling force, stamps upon the whole body of the law external and internal characteristics peculiar to itself. These three stages or means of development are (1) The use of fictions or fictitious forms contrived to meet some new occasion that has arisen in the social movement, which is done by evading the existing arbitrary rules, and at the same time preserving the *appearance* of retaining these same rules in full operation. (2) The introduction of equitable conceptions, modes of procedure, and tribunals, by which the judges openly and avowedly abandoning the ancient arbitrary modes and maxims, and even the very appearance of them, create in their stead new methods and rules based upon notions of abstract right and justice. The work of improvement during this stage is chiefly done by the courts in the free use of their highest function, — that of legislation. (3) The use of direct, positive legislation, the legislature as the supreme power in the State consciously acting upon the law as a whole and effecting changes in it in accordance with some preconceived plan.

§ 8. In the first and second of these stages, and especially in the first, the external forms of action play a very important, and, in fact, the only part. Starting from its primitive, rude, incomplete condition, when it is little more than a collection of the arbitrary forms I have described, the law pursues its steady growth, keeping pace with the requirements of an advancing civilization; but the original, arbitrary forms dominate over the growth, control its movement, and determine its shape and character. The very growth itself consists in modifications and new applications of the old legal forms and actions to circumstances and cases which arise. The entire law, the national code, — to use the expression still inaccurately, — is not a statement in abstract of the primary rights and duties which govern the conduct of individuals, but a mere statement of the remedies which an individual may have under given circumstances, by pursuing certain arbitrary and artificial modes of action. All the improvement of and all the addition to the law consist in two classes of operations, both performed by the judicial magis-

trates in the exercise of their high functions ; namely, (1) the invention of entirely new forms of action to meet some want, to apply to some new classes of events or transactions which have arisen in the social activity ; and (2) in the extending the old and existing forms of action so as to include cases and transactions not originally embraced within them. This work is almost entirely done by the judges, although occasionally the legislature intervenes, and at one blow effects the change or the addition. In both these two classes of operations, but especially in the latter one, fictions are freely resorted to, so as to effect the real improvement, — the new adaptation, — while preserving the appearance of a strict adherence to the ancient external form. It seemed to be a controlling notion in the minds of men during that period of development, to preserve the shell, the outside husk, with most scrupulous care, while the kernel was removed or replaced by fruit of another kind.

§ 9. The instance of the action of ejectment in the English law well illustrates my statement, both as to the general method of improvement and as to the use of fictions in pursuing that method. This action, when first invented, was designed solely to enable a tenant for years to recover possession of the demised land, during the continuance of the term, from some wrongful ejector who had taken and kept the possession. It assumed a real demise, an actual tenant, and a wrongful ejector who had the possession ; it was used only under these circumstances ; it contained no fictions, but was as real as any action known to the law. Prior to the allowance of the writ upon which the action was based, such a tenant had no means of enforcing his claim to the land. His interest was not looked upon as an estate, nor even as a right of any description which the courts would sustain. In the process of time, however, the tenant came to be regarded as clothed with a definite interest, a low kind of estate, and the action of ejectment was invented, as described, to protect his right and preserve his possession. This conception of the action continued until the reign of Edward III., or, as some say, until that of Henry VII. Subsequent to that time the judges began to contrive the series of fictions which rendered the action of ejectment such a strange anomaly to the legal student, and made it the usual and finally the only means of trying the title to lands between parties who adversely claimed to own the same in fee.

In the first place, instead of a real tenant, a fictitious tenant, John Doe, was substituted as the plaintiff, and a fictitious demise to him from the actual person who claimed to own the premises in fee and sought to establish his ownership by this legal proceeding. But as the arbitrary rule of the law required that the defendant in the action should be in possession, and as the adverse claimant of the fee might not be in possession, another set of fictions was contrived, and in this manner the action was at last completely transformed from its original purpose, and became the only mode for the trial of titles and the recovery of land by the absolute owner in fee.¹

§ 10. In this manner a legal growth proceeds through long periods of the national history. The legislature interferes but seldom with the private law, with the rules which define and control the rights, duties, and relations of individuals; its occasional acts of amendment are to correct some glaring abuse, or to make some abrupt change which has seemed to the courts to be impossible by their ordinary judicial methods. The task of developing the law is thus left almost entirely to the magistrates; and they proceed step by step, as cases arise, by using the actions with which they are familiar, and by preserving the external forms thereof, only enlarging their scope, and increasing the number of special instances to which they apply. From this cause the private law, as a whole, still continues, during the periods described, to be an enumeration and statement of the remedies and reliefs which injured parties may obtain, under specified circumstances, by following the well-defined and arbitrary modes prescribed in the actions and special proceedings which the courts permit or require to be used. These general propositions will now be illustrated by reference to the Roman and the English legal history, during the first and formative stages of each.

II. *The Workings of this Principle in the Roman Law.*

§ 11. At the earliest stage of the Roman law, of which there is any certain trace remaining, and for a considerable length of time subsequent to the decemviral legislation, known as the Twelve Tables, there were five actions by which all civil rights could be

¹ Spence, *Eq. Jur. of the Ct. of Chan.* vol. i., pp. 232, 233.

maintained. Nothing can exceed the arbitrary nature and intense formalism of these proceedings. It would be needless to attempt a detailed description of these curious and highly dramatic forms, and the reader is referred to the commentators upon the Roman law for a minute and particular account of the various acts which the litigant parties must perform, the phrases which they must repeat, the symbolic gestures which they must make. Absolute accuracy in complying with the established formula was required; any omission or mistake of a word or movement was fatal. Gaius says: "But all these actions of the law (*actiones legis*) fell gradually into great discredit, because the over-subtlety of the ancient jurists made the slightest error fatal."¹ The most ancient and important was the "action of the wager" (*actio sacramenti*), so named, because both parties deposited with the magistrate a certain sum as a wager, which the loser forfeited to the public treasury. The proceedings were highly dramatic and symbolic, representing to the eye the legal conception which was the basis of the action. It came to be used solely for enforcing rights of property over things. The second, the "action by demanding a jury" (*actio iudicis postulatio*), was so called, because the magistrate was asked to allow the appointment of an arbiter or *jury man* to decide the matter in dispute.² Little is known of its forms or objects; but it seems to have been used to enforce the fulfilment of an obligation when the engagement of the parties was not definite and certain, and some latitude of opinion was possible in the decision. Another, the "action of notice" (*actio condictio*), so called because the plaintiff gave notice to the defendant that he must appear before the magistrate in thirty days, was employed in case of all definite obligations. The "action by arrest" (*actio per manus injectionem*) was a proceeding by which the defendant was arrested, and immediately brought before the magistrate. Finally, in the "action by taking pledge" (*actio per pignoris capionem*), something belonging to the defendant was seized as security for the debt. These two latter were in reality proceedings in execution to enforce a judgment rendered in some prior suit.³

¹ Institutes of Gaius, bk. iv. § 80.

² The translation "jury man," represents far more correctly the meaning of "judex" than the common translation "judge." The "judex" in the Roman

action performed exactly the same function as our jury. The magistrate stood in the place of our court.

³ These and other Roman law actions are fully described in Sandars's Inst. of

§ 12. As these most ancient forms became disused, and were finally abandoned, their place was supplied by certain other judicial processes, to which the generic name, *formula*, was given, conducted before the magistrates of whom the most important were the prætors (*prætor urbanus* and *prætor peregrinus*). The Roman prætor corresponded to the English judges, common law and equity, while the "judex" performed the functions of the English jury. As the English courts have built up by gradual accretions the greater part of the law of England, so did the prætors, as truly and by the use of the same judicial legislative function, build up the largest part of the Roman jurisprudence, which, after being put into a more comprehensive and scientific shape by the labors of the great jurists under the empire, was at last codified by the orders of Justinian. The legislative work of the English and American courts is done in the judgments and opinions rendered upon the decision of cases after the events have happened which call for such official utterances. The same work of the Roman prætors was done in the edicts (*edicta*) which they issued upon taking office, and which in process of time became one continuous body of law, each magistrate taking that which had been left by his predecessors, and altering, amending, and adding to the same as the needs of an advancing civilization required. The form of this edict was peculiar. Instead of laying down general abstract propositions defining primary rights, or publishing formal commands similar to modern statutes, the magistrates announced that under certain specified circumstances a remedy would be granted by means of a designated action. In this manner the *edictal* or prætorian law took on the peculiar form I have already described, and ever kept in view the remedies and the actions by which they might be obtained as the very central conception of the whole system.

§ 13. From generation to generation and from century to century ideas of abstract right and justice more and more controlled the legislative action of the prætors; ancient arbitrariness was gradually abandoned, and practical rules became equitable. This result was accomplished by three separate processes, — (1) by extending the old forms of action to new cases, (2) by con-

Justinian, *Introd.* pp. 59-62. See also by Gaius, pp. 407-422; Commentaries of "Roman Law," by Lord Mackenzie, pp. Gaius, by Abdy and Walker, pp. 257-315-317; Poste's *Elements of Roman Law*, 269.

triving new actions analogous to the old ones, and (3) finally, by inventing actions entirely different in principle and in method. Fiction played a prominent part in the earlier stages of this progress, and equity in the later. The proceedings thus described were called "ordinary," and were strictly analogous to the English common-law action tried before a court and jury. The prætor was the magistrate who announced the law in his edict, and who applied this law to each case as it came before him, by designating the legal principle that controlled it, and by indicating that rule in the pleadings as the guide to its final decision. The prætor himself did not make this decision nor pass upon the issues of fact. They were referred to a special tribunal constituted for that purpose, generally a single "*judex*" or juryman, sometimes a single "*arbiter*," who seems to have had greater latitude and discretion than the *judex*, and in a few specified cases a larger body of jury men, who were then termed "*recuperatores*," or "*centumviri*."

§ 14. Side by side with this ordinary jurisdiction of the prætor, there grew up the extraordinary jurisdiction, in the exercise of which he decided both the law and the facts without the interposition of any *judex* or jury, and unhampered by any technical requirements as to the proper "formula" or action. Nothing could be simpler than the whole proceeding; the plaintiff alleged the facts making out his cause of action; the defendant answered, setting up his defence whole or partial; the magistrate decided. In this manner the prætor was enabled to grant remedies not provided for by any specified action, and to base his judgments upon notions of right and justice. In this extraordinary jurisdiction of the Roman prætor we plainly have the prototype of the English Court of Chancery, and of its equitable powers and principles.¹ Among the remedies invented in the exercise of this extraordinary jurisdiction, and for which there was no provision made by any known action or formula, were interdicts, which answered to our injunctions, both preventive

¹ See Sandars's *Inst. of Justinian*, *Introd.* p. 70. It has sometimes been said the entire functions of the prætor are reproduced in the modes of the Court of Chancery; but this is a mistake, and can only have resulted from a misconception of the Roman juridical system. The par-

allelism between the prætor wielding his "ordinary" jurisdiction and the common-law courts, and between the prætor wielding his "extraordinary" jurisdiction and the Court of Chancery, is absolutely perfect.

and mandatory; restitutions (*restitutiones in integrum*), by which a person was restored to his former position; the enforcement of trusts (*fidei-commissa*); and the settlement of insolvents' estates (*missio in bonorum possessionem*). In these remedies we find all the most important and peculiar kinds of relief conferred by the modern Court of Chancery, and all the grand principles which make up the body of modern equity. Interdicts, which were in fact broader in their scope than our injunctions, because they were used to restrain acts of mere violence, played a very prominent part in the theory of remedial rights. Restitution was the name applied to a large class of remedies adapted to differing circumstances and answering to numerous special decrees granted by our equity tribunals. The modern doctrine of trusts was confessedly borrowed from the *fidei-commissa*; and, although its scope has been greatly enlarged, the principle which underlies it is the same. Finally, the *missio in bonorum possessionem* was the origin of the systems of bankruptcy which form a stable part of the jurisprudence of all European nations. This equitable procedure, after running side by side with the ordinary or legal, grew in importance, and became in time the only practical method in use, — every litigation being turned into the prætor's extraordinary jurisdiction. At length, by a constitution of Diocletian (A. D. 294), all causes in the provinces were required to be tried in this manner; and shortly after the same rule was made universal throughout the empire.¹ The codification made by the direction of Justinian contains only this sensible and natural mode of administering the remedial department of the law, because the ancient formalism had long before disappeared.

III. *The Workings of this Principle in the English Law.*

§ 15. The same facts, the same underlying principles, and the same course of development are shown in the history of the English law. Bracton (A. D. 1256–1259) modelled his treatise upon the Institutes of Justinian, and thus gave his work the appearance of some scientific order and method; but his book was certainly in advance of the time in which it appeared, and the law

¹ See Lord Mackenzie's *Roman Law*, p. 819.

for many generations and even centuries did not follow the logical system which he borrowed from the civilian institutional writers and commentators. With those jurists he divided all actions, — all the common-law actions, for as yet the equitable jurisdiction of the Court of Chancery was unknown — into real, personal, and mixed ; and this classification has been preserved to our day, although it is utterly without any practical results.¹

§ 16. *Real Actions*. — Real actions were based upon the plaintiff's, or demandant's as he was called, right of property in the specific thing which was the subject of controversy, his *dominium* ; they were brought to establish this ownership, and sometimes his right of possession against an adverse claimant who had taken possession and asserted ownership. In this respect they were identical with and plainly copied from the group of actions in the Roman law termed " vindications " (*vindicaciones*), but differed from the latter in being confined to lands. For movables there was no real action, no vindication, and damages alone could be sued for. The ancient real actions in the English law were separated into two classes, the *petitory*, in which the controversy was concerning the property and right (*super proprietate et jure*), and sought to establish such property ; and the *possessory*, in which the controversy was concerning the possession. The petitory real actions were (1) the writ of formedon, of which there were three varieties, in the *descender*, in the *remainder*, and in the *reverter* ; (2) the writ of *quod se deforcias*, for owners of life estates, such as dower and the like ; and (3) the writ of right, to recover the absolute fee. The possessory real actions were (1) the writ of entry, and (2) the writ of assize, of which there were two varieties, assize *mort d'ancestor*, and assize of *novel disseisin*. The relation of the possessory to the petitory actions was such that an appeal to the former did not preclude the subsequent use of the latter, while on the contrary the first use of petitory actions prevented all recourse for ever afterwards being had to the possessory.²

§ 17. *Mixed Actions*. — The only mixed actions spoken of by Bracton were those employed for the partition of lands among

¹ Bracton and his Relation to the Roman Law, by Güterbock, trans. by Brinton Cox, pp. 150, 151.

² For a fuller description of these real

actions, their special objects, and their procedure, see Blacks. Comm. bk. iii. ch. 10, pp. 180-197.

co-owners. Others, however, were subsequently invented and placed without much regard for logic in this class. The most important of them were the action of ejectment, which always preserved the form of a mere possessory proceeding, although it finally took the place of even the petitory real actions as the means of trying titles; the action of waste, in which the possession of the land wasted by the tenant and damages for the injury were recovered; and *quare impedit*, which was confined to certain ecclesiastical property.

§ 18. *Personal Actions*. — Personal actions (*in personam*) were directed against the particular person liable; and the final remedy which they conferred was always a sum of money. They were separated, according to the nature of the act which was the occasion of putting them in motion, — the omission or delict of the defendant, — into those *ex contractu* and those *ex delicto* or *maleficio*. The arrangement made by one text-writer of authority, Mr. Chitty, in his treatise on Pleading, includes in the class *ex contractu* debt, covenant, assumpsit, detinue, and account, and in the *ex delicto* trespass, case, trover, and replevin. It is difficult to see why detinue should be called an action *ex contractu*, and replevin an action *ex delicto*. Neither more than the other is founded upon contract, and both are in their essence actions *in rem*, — vindications, — and seek to recover the very *corpus* of the goods. This is a striking example of the utter want of consistency and logical order running through the treatment of the common law by the best of its text-writers, and resulting partly from the arbitrary division of things into real and personal, lands and chattels, and of property therein into real and personal estates. Because the taking or the detention is in itself an act of wrong, and not an agreement, some writers range both detinue and replevin in the class *ex delicto*.

§ 19. A sketch of the origin and progress of these actions through various stages will illustrate the workings in the common law of the general principle that I am discussing. At the earliest times there were only four personal actions, — debt and covenant strictly *ex contractu*, and trespass and detinue. An action was commenced by the issuing of a process from the court, called the original writ, which briefly described the injury, omission, or wrong alleged against the defendant, and indicated by proper technical phrases the form of the action which would

ensue. As "debt" was the appropriate action in which to recover a sum of money upon contract where the amount was already reduced to a certainty, as "covenant" was confined to the claim for damages upon the breach of a sealed agreement, as "trespass" was used for the recovery of damages resulting from acts of violence done to the person or property of the plaintiff (*vi et armis*), and as "detinue" was a proceeding for the recovery of specific goods and chattels wrongfully detained from the owner, it was an easy matter to find the forms of writs suited to facts and circumstances which plainly fell within some one of these four remedies. If the debt was certain in amount, if the writing was sealed, if the wrong had been done by force, or if the specified thing of the plaintiff was withheld from his possession, the form of proceeding in which to obtain relief was well known, determinate, and fixed. But when events happened, when circumstances occurred quite different from the essential features which characterized any one of the four remedial forms thus described, and a wrong was thereby done to an individual, it was by no means certain that he could obtain any redress. These four actions were known, and no others. "All breaches of contract unwritten, or unsealed if written, were remediless, unless they created an absolute and stipulated debt. All obligations arising from the mere acts of parties,—more frequently called implied contracts,—which form so large a part of the rights that courts enforce at the present day, and which spring from the plainest principles of justice and equity, were unrecognized."¹ Undoubtedly the officers of the Chancery were permitted and expected to frame writs to meet new cases which did not depart too widely from the existing precedents; but it is known historically that these officials were reluctant to use such an authority, and the common-law-judges were reluctant to yield to it when used. To say that all rights and duties resulting from fraud, deceit, negligence, verbal defamation, and other wrongful practices not forcible, were ignored and unprotected, would perhaps be too sweeping; there are faint indications that the action of trespass was sometimes resorted to in cases of negligence, fraud, and slander, but the instances were extremely few, and for this large class of private wrongs there was substantially no private remedy.

¹ Pomeroy's *Introd. to Munic. Law*, § 199.

§ 20. At this point the legislature interposed in aid of the courts, and during the reign of Edward I. (13 Edw. I. ch. 24, A.D. 1284) Parliament enacted that "Whenever from henceforth it shall fortune in chancery that in one case a writ is found, and in like case falling under like law and requiring like remedy is found none, the clerks of chancery shall agree in making the writs." Thus was opened the way for new actions and remedies to apply to all the new circumstances which could arise, and the judges were not slow to avail themselves of the privilege, because it afforded an opportunity not only to do prompt and substantial justice between parties, but also to enlarge in an unlimited manner their own jurisdiction. The modifications and additions were made in the action of trespass, which in its original conception was applicable only to wrongs accompanied or caused by violence. New writs were framed by which the action was extended to cases where the injury is consequential and indirect. At first the improvement was confined to instances of *malfeasance* when a person has done something that he ought not to have done. Between this beginning and the instances of *misfeasance*, or doing in a wrongful manner what ought to have been well done, the division line was shadowy, the step was short and was soon taken. Hence arose an additional class of actions known as "trespass on the case," or simply "case," which enabled the court to grant the relief of damage for fraud, deceit, negligence, want of skill, defamation oral or written, and all other injurious acts to person or property which are not done by direct force. In the process of time a second additional action, as an offshoot or species of "case" was invented, but was confined in its operation to a particular kind of delict; namely, the unlawful detention of goods and chattels from their owner, and their conversion to his own use by the wrong-doer. It was called "trover," from the French verb *trouver*, to find, which invariably occurred in a fictitious allegation of the pleading charging that the plaintiff had lost the chattel, and that the defendant had *found* the same, and had converted it to his own use. As yet there was no remedy for the breach of those contracts which could not be enforced by the actions of debt or of covenant. To supply this want, the courts, still retaining the idea of the wrong done by the defendant, so as to preserve the theoretical connection with the primitive action of trespass, extended the new form

of proceeding so as to include all instances of *nonfeasance*, or those in which a person has failed or refused to do what he had actually or impliedly promised to do. This step in advance produced the action of "assumpsit," which grew to be the most common and important judicial method of enforcing legal rights. Although in its origin ranked with the *ex delicto* actions, it has long been regarded as belonging entirely to the class of those *ex contractu*. By its means a very large portion of the mercantile and commercial law has been added to the jurisprudence of England and of America. It is eminently an equitable proceeding, free from arbitrary and artificial rules and requirements.

§ 21. The ancient real actions being excessively technical, and entirely unfitted for an age of activity, progress, and enlightenment, gradually passed out of use, and their objects were accomplished by means of the modified "ejectment" enlarged in its scope and adapted to the trial of titles by the fictions which have been already described. As the result of this inventive function of the courts, we find in England and in the United States, prior to the recent amendatory legislation, the following common-law forms of action by which civil remedies were administered: *trespass*, to recover damages for a wrongful act of violence to person or property; *case*, to recover damages for a wrong to person or property, unaccompanied by violence, or when the injury is consequential; *trover*, to recover damages for the unlawful detention and conversion of chattels. These were *ex delicto*. The actions *ex contractu* were, *covenant*, to recover damages for the breach of a sealed agreement; *debt*, to recover a fixed certain sum owed by the defendant, not as damages; *assumpsit*, to recover damages for the breach of a contract not sealed, whether written or verbal, express in its terms or implied by law. The following bore a logical resemblance to real actions, the vindications of the Roman law: *ejectment*, to recover possession of land, and to try the title thereto; *detinue* and *replevin*, to recover possession of specific chattels. Replevin, which was confined to certain special cases in England, had been generally adopted throughout the United States in the place of detinue.

§ 22. By the side of this ordinary procedure of the common-law courts there grew up the extraordinary jurisdiction of the Court of Chancery. In the most ancient times a suitor who could not obtain relief from the courts of law, had no other alter-

native than an application to the king himself. These appeals were entertained by the king and his council, and for a while an imperfect kind of justice was thus administered according to the notions of right held by the monarch and his advisers. As the number of these applications increased beyond the ability of the king to devote to them his personal attention, the practice arose of referring them to the chancellor, who, in his high official character of confidential adviser to the Crown and chief dignitary of the state, seemed to be the most appropriate person to relieve the king of these judicial duties. In the 22d year of the reign of Edward III. (A.D. 1348-49) a general order was made referring all such matters for examination and decision to the chancellor; and from that epoch the Court of Chancery dates its commencement as a special tribunal, possessing an exalted jurisdiction distinct from that of the courts of law. The earliest records of the court show that occasionally cases were brought before it which clearly belonged to the ordinary jurisdiction of the common-law judges, even cases of personal wrong and violence, which were properly redressed by the action of trespass. These instances, however, were very exceptional and quickly disappeared. The judicial functions of the chancellor soon became well defined. The procedure in equity was free from the trammels of rigid forms and of actions constructed upon an arbitrary model, and admitting only specified kinds of relief; the final remedies in equity could not only be based upon motives of abstract justice, but could be adapted to the special facts in each particular case and to the rights and relations of all the parties to each other. In other words, the chancellor was not obliged to render a given form of judgment or none; he was not restricted to granting the relief of a sum of money or of the possession of a given tract of land or of a given chattel; he might and did vary his decrees in every possible manner, and determine the rights of the litigant parties completely and finally.

§ 23. The parallel which I have already mentioned between the ordinary or legal jurisdiction of the Roman prætor and his extraordinary or equitable jurisdiction on the one side, and the English common-law courts and their methods, and the Court of Chancery and its methods, on the other side, is perfect. This parallelism has lately been carried still further by the recent action of the British Parliament. The equitable jurisdiction of the

Roman magistrates not only reacted upon the ordinary legal jurisdiction, introducing more and more the influence of abstract right and justice, and sweeping away the ancient arbitrariness and devotion to external forms; but it gradually grew in magnitude until it became by far the more important of the two. Exactly the same process has gone on for centuries in England. The modes and the notions of equity gradually penetrated the common-law tribunals; equitable principles were invoked in the decision of legal actions; the common law has become scarcely distinguishable, in the underlying juridical forces which govern its movements, from the mass of doctrines which, taken together, are called equity jurisprudence; and this equity jurisprudence itself has grown to be vastly superior, in magnitude and importance, to the legal division of the double system which forms the entire law of England. Finally, by a statute (constitution) of the Emperor Diocletian, the ordinary legal jurisdiction was abolished, and the extraordinary or equitable methods became universal. Here, too, the parallel continues. By a statute of Parliament, passed in 1873, and which goes into effect on the 1st of November, 1875, the superior courts of law — the Queen's Bench, the Common Bench and the Exchequer, and the Court of Chancery, and the Courts of Admiralty and of Probate and Divorce, and of Bankruptcy — are combined into one grand tribunal, to be called the Supreme Court; the distinctions between legal and equitable procedure are removed; and one form of action is to be used in the administration of justice between private suitors, and in granting all civil remedies which may be obtained by litigant parties.¹ This great change, now about to be made in England, had been effected twenty-five years before in New York, and is in full and successful operation in more than half the commonwealths of this country. Whether law and equity, whether the legal and the equitable methods and remedies, can be completely united and consolidated in one homogeneous system, similar to that which prevailed in Rome during the

¹ This statute was originally to go into effect on the 2d of November, 1874, but the time was subsequently postponed for one year. The court as a whole is styled "The Supreme Court of Judicature in England," and consists of two permanent divisions; one of which, styled

"Her Majesty's High Court of Justice," has general original jurisdiction, together with some appellate jurisdiction from inferior courts, and the other, styled "Her Majesty's Court of Appeal," has a general appellate jurisdiction.

later empire, may be doubted. (I am of the opinion that such a result cannot be reached until trial by jury is abandoned, and the magistrate is left to decide both the law and the facts in every civil proceeding.) While the jury trial lasts, there are difficulties in the way of an absolute unity of method which seem to be insuperable. What the union between law and equity effected by the American codes of practice actually is, what consequences in the administration of justice and in the granting of civil remedies this union must necessarily produce, if the spirit and the letter of the legislation are obeyed, I shall show in a subsequent portion of this treatise. As the necessity for a separate court of chancery arose in great part from the use of the jury trial by the common-law courts, it hardly seems possible that this necessity has now been obviated, or that the equity tribunals and methods can be absolutely merged in those of the common law, and still less that the common-law tribunals and methods can be so merged in those of equity, as long as the jury trial — the original element of distinction — continues to exist.

§ 24. In thus describing the progress of our law, and the methods by which it has been built up, *created*, I may properly say, through the exercise of the judicial legislative function of the courts operating by the decision of individual cases, I have explained the peculiar external form as well as the internal nature of that law as a complete system. For the larger part of the history the development has taken on the form of extending, modifying, enlarging, improving, and adding to the various actions, their comprehensiveness, their application to the new facts, events, and relations constantly arising in the movements and advance of society and civilization. (During that period it was impossible to separate the fundamental principles, the abstract rules which determine the primary rights and duties of individuals, from the more arbitrary and technical rules which relate directly to the procedure and to the methods and processes by which the judicial remedies were granted to suitors.) This statement is abundantly verified by an examination of the published records in which the acts of the courts have been preserved. A study of the books of reported decisions, published prior to a very recent time, shows that the judges seldom attempted to view the law as a body of general rules based upon great principles of right and justice, or to consider it apart from the mere external modes in which it was

made applicable to individual cases. Their opinions almost uniformly discussed the narrow question, whether such or such an action was proper under the circumstances before them, and whether the steps taken in it had been regular, and, if irregular, what effect was produced by such default upon the claims of the litigant parties. Doubtless more general and fundamental principles were often involved in these apparently technical discussions; but they were involved in a very subtle and obscure manner, so deeply involved as to be very difficult of apprehension. It is true that in more recent times there has been a great and most beneficial change. The courts of equity never being so much restricted by external and rigid forms, their notions and methods at last produced a marked effect upon the common-law judges and lawyers. The latter tribunals felt the influence, and were led to look at the substance behind and distinct from the forms. [In the second place, a succession of learned and able commentators and text-writers had done much to mould separate and important portions of the jurisprudence into a logical, scientific, and homogeneous form.] Finally, the stage of direct legislation had commenced, and both in England and in the United States, whole departments of the private law had been put into a statutory shape, and some progress had been made towards an exhaustive code. In fact, the private law of England and of the United States had reached a period of its development analogous to that of the Roman law before the decline of the empire had begun, after the creative function of the prætors had virtually ceased, and while the writings of the great jurisconsults and the constitutions of the emperors were the principal sources of the law, and were transforming it from the fragmentary shape of the Edicts into the philosophical order and symmetry exhibited in the Institutes of Gaius. Notwithstanding this change—almost revolution—which had commenced within the last fifty years, and which had probably been more thorough in the United States than in England, the old system of formal actions and technical modes of procedure still exerted a very decided influence through the whole body of the law, and still reigned supreme in the department of remedies and remedial rights.

SECTION SECOND.

REMEDIES AND REMEDIAL RIGHTS PRIOR TO THE MODERN REFORMS IN PROCEDURE.

§ 25. The division into legal and equitable relief, and the common-law forms of action, presented a theoretical and a practical classification of remedies and remedial rights, which was universally accepted as not only proper, but as the only one possible under the circumstances. Here was a system ready made; and, no matter how artificial and arbitrary it was, no other could be adopted as long as the ancient practice prevailed. We therefore find that all the English and American treatises, commentaries, and digests, so far as they treat of remedies, have followed the order which the common-law system of actions suggests, without a question as to its practical efficiency, whatever might be thought of its theoretical correctness. (In fact, this classification was practically efficient; that is, it enabled the court and the bar to go through with the routine of business without much liability to mistake growing out of the method itself.) I will illustrate this statement by a familiar example. Whatever may be said of reform in the law, of amending it so that it may be more consistent, logical, and scientific, the most important practical duty of the lawyer is to procure some relief for clients whose legal rights have been invaded. In this country at least the great mass of men go on with their affairs, trusting to their own knowledge or to their luck, until a difficulty is actually encountered; and then they apply to a lawyer. His first and in general only duty in such case is to ascertain what remedy is furnished by the law applicable to the facts disclosed to him, and to obtain that remedy, if possible, through the action of the courts. In determining this most important, practical question, What is the appropriate remedy, and what are the client's remedial rights? the established divisions which I have described lie open before him as an almost unerring guide. He can easily decide whether the case falls within the department of equitable or within that of legal rights, duties, and reliefs. The lines which separate these two grand departments are so well defined that in the vast majority of instances he could not err in making his choice, except through the grossest ignorance or negligence.

If the case is legal rather than equitable, the lawyer has next to determine the form of remedy awarded by the law courts to which his client is entitled. Here, again, the field is so carefully mapped out, the divisions are so plain, that his task is comparatively easy. If the matter in controversy is the ownership of a tract of land or of a specific chattel, and the object of the litigation is to declare such ownership and to recover possession, he knows that ejectment in the one case, and replevin in the other, *must* be the judicial instrument by which the rights are to be asserted. (If the relief is to be pecuniary, the question presents itself, and can be answered as soon as asked, — answered almost mechanically, — Is the cause of action the breach of a contract, or is it some tort to person or property?) If the former, the distinctions between debt, covenant, and assumpsit are patent, and any error in the choice is virtually impossible; indeed, all the lawyer has practically to do is to ascertain whether the contract is sealed or unsealed, for every case of simple contract, although it creates a debt, may be, and naturally would be, sued in assumpsit. If the cause of action is a tort, mere ordinary knowledge, a very moderate acquaintance with the modern rules of procedure is sufficient to determine the choice between trespass, case, and trover. Although in former times the difficulty of distinguishing between trespass and case was often very great, although the special rules which governed their use were technical, even absurdly technical, this difficulty had long ago disappeared, this technicality had long ago been removed. It sometimes happened that the facts presented to the lawyer did not bring the client's case within any of these ordinary forms of procedure; neither a suit in equity nor any common-law action could afford the relief applicable to the situation. Even in such an exceptional instance the common law provided other and special methods, and the choice between them was comparatively easy.

§ 26. There were thus many and great practical benefits connected with, and arising out of, the system of procedure which has lasted through so many centuries. Conceding that the system, as a whole, was based upon no scientific, logical, or true principles, that it was arbitrary and artificial, that sometimes it had been wedded to technicality in such a degree as to produce gross injustice to suitors, yet, as this technical habit of mind had passed away, there was left a method of arranging, classifying,

and administering remedies and remedial rights which was clear, definite, certain, and easy to be understood and to be worked out in actual practice. The lawyer knew exactly what remedies the courts would grant in a given case, and the form, manner, and means by which such remedy was to be sought and obtained. There was an order, a classification, running through the whole department of civil remedies which could be acquired by an exercise of the memory; and although the reasons upon which that classification was based were, like much of so-called legal reasoning, a mere formula of words, without any real meaning, yet, when the artificial premises were conceded, the results could be understood. The system, however, did not rest upon its *reasoning* so much as upon dogmatic authority, precedent, and habitual use.

§ 27. While an order, a classification, of remedies and remedial rights thus existed, perfect of its kind, practically adapted to the administration of justice in the manner which had long prevailed in England and in this country, this order and classification were founded upon, inseparably united with, and indeed a part of, the artificial method of administering justice which I have described, and which is so familiar to every lawyer,—the division of courts into law and equity, the separation of the entire jurisprudence into legal and equitable, and the use of fixed forms of action and of special proceedings for the obtaining all the remedies which the common-law tribunals conferred upon suitors. The artificial peculiarities of the remedial department, the very order, arrangement, kinds, and classes of remedies, and of means for their attainment which were so certain, well defined, and comprehensible, depended upon broader and deeper peculiarities, which lay at the bottom and pervaded the whole superstructure of our law. A change in the latter renders a change in the former inevitable. When a fundamental reform has been accomplished, when the artificiality and arbitrariness in the whole body of the law have been removed, when the division-wall between law and equity has been broken down, when all the separate forms of legal actions have been abolished, the *raison d'être* of the existing classification of remedies and remedial rights also disappears. I would not be misunderstood in this statement. The *remedies themselves*, the final reliefs which are granted to litigant parties who establish their rights, remain unchanged; ownership of specific tracts of

land, or of specific chattels, may still be declared, and the possession thereof recovered; pecuniary compensation may still be obtained for the breach of contracts and for wrongs done to property, person, and character; proceedings may be reviewed and reversed as by *certiorari*; acts may be enforced as by *mandamus*; the vast range of special reliefs conferred by the Court of Chancery is retained. {The problem is to classify, arrange, define, and describe these remedies so that the particular one appropriate to a given state of facts may be seen at once by the practising lawyer and by the judge.} Heretofore this classification, arrangement, definition, and description have depended entirely upon the *peculiar and artificial means and instruments* by which the remedies themselves could be obtained, by the use of which they were sought from and conferred by the judicial tribunals. When at one blow all these peculiar and artificial means and instruments are swept away, the very basis of the classification disappears, and with it the classification itself. To retain a classification founded upon facts which no longer exist, facts which, from disuse, are rapidly passing away from the recollection of the older lawyers and were never known to the younger members of the bar except as the result of curious and antiquarian study, is worse than useless; it can only produce confusion, disorder, and uncertainty in the administration of justice. When the legislature has attempted to introduce simplicity into the mode of judicial trials, so that the ultimate primary rights and duties of the litigant parties may be presented for investigation and decision unconnected with, and untrammelled by, any collateral difficulties growing out of questions as to the proper form of the mere means and instruments which the party has chosen by which to present his claim to the judges, a retention by lawyers and judges in any manner and for any purpose of these old means and instruments, and of the arbitrary distinctions between them, and of the arbitrary rules controlling them, must interfere in some measure with the intent of the legislature, and may utterly defeat the beneficial purpose which it had in view. I shall have occasion to return to the subject, and shall point out in detail the evil effects of combining the old forms and modes of thought with the new system which the reformatory legislation has introduced.

SECTION THIRD.

REMEDIES AND REMEDIAL RIGHTS UNDER THE REFORMED AMERICAN SYSTEM OF PROCEDURE.

I. *The Reformatory Legislation.*

§ 28. In the year 1848 the Legislature of New York adopted the Code of Procedure. The fundamental principles of this code, so far as it is now necessary to notice them without going into detail, are the following: (1) The abolition of the distinction between suits in equity and actions at law, and the distinctions between legal and equitable procedure, so far as such an amalgamation or consolidation is possible with the judicial institutions which have been retained; (2) The abolition of all common-law forms of action, and the establishment of one ordinary, universal means by which rights are maintained and duties enforced in a judicial controversy, called a "civil action;" (3) The application to this "civil action" of the familiar equitable rather than legal rules, methods, and principles, so far as practicable, and especially in reference to the parties, the pleadings, and to the form and character of the judgment. It is evident, from the most cursory examination of this code, that its authors, and presumably the legislature, intended that the various provisions which they introduced in reference to the parties to an action, to the pleadings therein, and to the judgment which might be rendered, and which were a concise statement of the well-settled doctrine of equity relating to these subjects, should apply fully and freely to all actions which might thereafter be brought, and should not be confined to actions that, under the former practice, would have been equitable. Whether the courts have at all times recognized and carried out this plain intention of the statute may well be doubted. I have been careful, in the above statement as to the union of law and equity. The language of the code is as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which

shall be denominated a civil action.”¹ A subsequent provision,² based upon the clause in the State constitution which preserves the jury trial “in all cases in which it has heretofore been used,”³ recognizes the fact that the jury trial must still be retained in all actions which were before denominated legal, with the unimportant exception which formerly existed, — namely, where the trial will require the examination of a long account, — and thus, in express terms, prevents an absolute identity in the judicial proceedings which result in remedies that would have been legal and in those which result in remedies that would have been equitable. As I have already said, the perpetuation of the very fundamental element of difference between the trial at law and the trial in equity — and the perpetuation cannot be avoided as long as the constitution remains unchanged in this respect — prevents a complete removal of the differences between legal and equitable procedure and the absolute union of law and equity into one homogeneous system. How far the differences between the final remedies which courts of law granted exclusively, — namely, the recovery of a specific tract of land or of a specific chattel, and the recovery of money in the form of pecuniary compensation, — and the infinite variety of special remedies which courts of equity were accustomed to grant, may in themselves prevent such a perfect union, I shall discuss and attempt to determine in a subsequent chapter.

§ 29. The New York Code, in respect to the fundamental principles and provisions which I have stated, has been adopted in twenty-two other States and territories of this country, — in the States of Ohio, Indiana, Wisconsin, Iowa, Minnesota, Kentucky, Missouri, Kansas, Nebraska, Nevada, Oregon, California, North Carolina, South Carolina, Florida, Alabama, and in the territories of Washington, Montana, Idaho, Dakota, Wyoming, Arizona. I need not now compare these different State and territorial codes in their details; it is enough for my present purpose to say that they all embody the same three fundamental principles. It is true that in Kentucky, in Iowa, and in Oregon, the abolition of the distinction between legal and equitable actions is not *nominally* so absolute as in New York, and the other States and territories named in the foregoing list. The following are the provisions of

¹ N. Y. Code of Procecd. § 69.

² Ibid. § 253.

³ Const. of N. Y. Art. I. § 2.

the Iowa statute: "All forms of action are abolished in this State; but the proceedings in a civil action may be of two kinds, ordinary or equitable." "The plaintiff *may* prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction, and *must* so proceed in all cases where such jurisdiction was exclusive." "In all other cases, except in this code otherwise provided, the plaintiff must prosecute his action by ordinary proceedings." "An error of the plaintiff, as to the kind of proceedings adopted, shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings and a transfer of the action to the proper docket." "The provisions of this code concerning the prosecution of a civil action apply to both kinds of proceeding, whether ordinary or equitable, unless the contrary appears."¹ The corresponding clauses of the Kentucky Code of Practice are identical in language with those found in the Iowa statute.² It is plain from these citations that the difference between the New York system and that of Kentucky, Iowa, and Oregon is nominal merely; in fact, the latter simply expresses in words what the former necessarily implies. A plaintiff in Kentucky, Iowa, or Oregon, at the commencement of his first pleading—complaint or petition—names the proceedings, ordinary or equitable, as the case may be, and exactly the same rules of pleading, of parties, and of judgment apply to the action in either case; there is no difference of form or method. If it is an ordinary proceeding, it is tried before a court and jury; if equitable, before a court consisting of the same judge, but without a jury; and the only result of a mistake in properly entitling the proceeding is to transfer it from one court calendar or docket to the other.

§ 30. The reformatory legislation first introduced by New York in 1848, has up to this time been adopted in nearly one-half of the States and in six of the territories. It may well be regarded, and I shall treat it, as *the American system*. While changes may be made in its details, while minor variations do exist in some of the States, it is simply impossible that any of the broad principles upon which it is founded will ever be abandoned; so far as the subsequent legislation in other States differs from that

¹ Code of Iowa, Revision of 1873, §§ 2507, 2508, 2513, 2514, 2520. 1859, §§ 1, 3, 4, 5, 13. The same is substantially true of the Oregon Code.

² Kentucky Code of Practice, ed. of

originally enacted in New York, it carries out these universal principles to their logical results with greater freedom. Additional States will surely accept this American system, and it will probably become universal throughout the country. The act of the British Parliament, already referred to, is based upon the same general principles. Although the practice authorized by that statute will be very different in many respects from the American mode of procedure, yet it will involve an abolition of the common-law actions, and a consolidation of law and equity not only as respects the tribunals, but as respects the judicial means and instruments by which remedies are to be obtained.

II. *The General Nature of the Civil Action.*

§ 31. Since the original inauguration of the American system in 1848, no attempt has been made to rearrange and reclassify remedies and remedial rights in accordance with the new order of things. The profession and the courts have been left to work their way in the dark; and the consequence has been an utter confusion and uncertainty, which have gone far to defeat the beneficial purposes of the reform, and to create a conviction in the minds of many very able lawyers and judges that the change was a positive evil. Although the statute is most peremptory in its terms, going to the very root and overturning the growth of ages, yet in the actual administration of justice it often seems to be forgotten that a new era has commenced; it often seems to be assumed that the sharply defined separation of legal and equitable methods and the various common-law forms of action still remain in all their arbitrary requirements. This confusion partly results from the fact that the practising lawyer has no hand-book adapted to the present system analogous to the familiar treatises upon actions, parties, and pleadings, which were his ready and safe guides under the former dispensation; and partly from the dogged unwillingness shown in some quarters to accept and conform to the new order of things. I have already shown that the modes of classifying remedies and remedial rights, and the whole practical treatment of this department of the law, based upon the artificial foundation which has been swept away, are wholly inapplicable to the modern procedure, and I need not return to the discussion of that particular point. The truth of the statement is evident without further argument.

§ 32. The fundamental conceptions embodied in the American system are natural and true. They are in perfect accord with the experience of mankind as shown in the history of legal development from an infancy of rude barbarism to a maturity of enlightened civilization. The whole course of such development consists in discarding rules, modes, and institutions, which were arbitrary and formal, and in bringing the law into an agreement with abstract justice and pure morality. We have now reached the stage when, by an act of legislation, our judicial proceedings have in theory at least been made simple, when natural methods have taken the place of the artificial, when the sole object of a forensic trial is to arrive directly at the truth, and when the search after the truth is not confined to any prescribed forms nor shut up between any rigid barriers. The theory is perfect; but the complete results anticipated from it in practice will not be reached unless the whole department of remedies and remedial rights shall be rearranged and reconstructed so as to be in harmony with the grand ideas embodied in the theory. Is such a reconstruction possible? We have seen that the system lately in use was based upon arbitrary external facts, — facts which had no necessary *a priori* existence. The ancient law, in dealing with the department of remedies, in determining the extent of remedial rights, and in prescribing the means by which such rights should be enforced, generally ignored all the distinctions which exist in the very nature of things, and seized hold of collateral incidents which had no possible connection with the essential substance of the right to be maintained or of the relief to be granted. A single illustration will suffice. If the stipulations of a written agreement have been broken, the presence or absence of a morsel of wax or a wafer fastened upon the paper, and called a seal, determined which one of two distinct actions was the proper means of recovering compensation in the form of damages. Throughout the entire common-law modes we find this neglect of essential attributes and this reliance upon outside, immaterial, incidental features, which caused the English jurisprudence to appear arbitrary and even grotesque when compared with that of the enlightened states of continental Europe.

§ 33. All this must evidently be abandoned, if the spirit of the reformed procedure is to be carried out, and its object is to be attained. The remedies which the law provides for all violations

of primary duties and the rights to the same, must be arranged, classified, and described according to some qualities that inhere in their very nature; and to accomplish such a result is the ultimate design of the author in preparing this treatise. As a preliminary, however, to the final work of describing, arranging, and classifying the remedies themselves, it is important and indeed indispensable that the principles of the single judicial instrument for the prosecution of all remedial rights and the obtaining of all remedies, should be ascertained and stated. The Civil Action is therefore the special subject of the present volume.

§ 34. The single civil action for the protection of all primary rights and the enforcement of all primary duties is the central element of the new procedure. All distinctions between actions at law and suits in equity and between the different forms of common-law actions having been swept away, the suit in equity and the common-law actions themselves as distinctive judicial instruments have been abrogated, and in their stead has been substituted the one civil action. In its essential features and fundamental principles there is an absolute unanimity among all the codes; even the divergence from the common type already mentioned in those of three States is only nominal and apparent. There is, it is true, a certain amount of difference in the matters of detail connected with the prosecution of the action, in the incidental steps taken and acts done by the litigant parties from the first issue of process to the final enforcement of judgment by execution; but with all these variations in the mere practice, the action is everywhere the same in its essential conception and in all its organic elements. If we disregard, therefore, the external, and so to speak accidental details, the reformed American procedure, in its statutory creation, in its legislative intention, is a unit, a single, harmonious, identical system. It is possible for this purpose to be carried into effect, and for the procedure to be made in its actual administration what it was designed to be by its authors. In every State there already exists a body of judicial decisions giving a construction to those fundamental portions of the local code which directly relate to the civil action; and these decisions are based upon a statutory text which is everywhere the same in import, if not absolutely identical in language. By comparing, contrasting, and combining the interpretations thus given by the various tribunals, their agreements and discrepancies

can be ascertained, and a single harmonious result can be evolved, by which the ultimate objects of the reform itself shall be accomplished. I shall attempt to perform the work thus briefly indicated. I purpose to describe the civil action of the reformed American procedure; to discuss its fundamental principles; and to present it in all its essential features, as the single judicial instrument for the maintaining of all remedial rights and the obtaining of all remedies. In carrying out this design, I shall not deal with matters that are purely of practice; my purpose is to ascertain and state what the civil action *is*, and not how it is commenced, prosecuted, or ended.

§ 35. At the very outset of the undertaking it is necessary to determine with accuracy what are these essential principles and features which constitute the civil action, and which thus form the central element of the entire reformed procedure. First in importance, underlying the whole system, and from which all others flow as natural consequences, is the abolition of the distinction between actions at law and suits in equity. The new procedure is built upon this fact as its very corner-stone; every other characteristic feature of the civil action results from it as a necessary corollary. The interpretation given to this one legislative enactment by the courts of any State must determine the nature of the system which is created therein, whether it shall comply with or disregard the intent of the law-makers, whether it shall accomplish or defeat the objects of the reform. The first and most important step, therefore, in treating of the civil action, involves an exhaustive discussion of this principle. Its extent and limits must be established, and its full force and effect ascertained. Before any consistent theory of the civil action can be developed in even a single State, a principle of interpretation must be agreed upon and settled by the courts, so general and comprehensive that it can be applied to all the varying relations and phases of the action, and can be invoked with certainty and success in determining all the subordinate questions, and removing all the minor difficulties, which shall arise in constructing the body of practical rules that constitute the entire procedure; and this principle, when thus established in a general form, must be steadily adhered to by the judges without exception or deviation. The courts have, however, fallen far short of this ideal; and, to the casual observer at least, the product of their judicial labors

in respect to this particular subject-matter, seems to be a mass of uncertainty, confusion, and contradiction, although upon a closer examination it will be found that some substantial work has been done, some solid foundation of principle has been laid. The causes of this confusion are twofold. The first of them is intimately connected with the constitution of the courts themselves. From the inauguration of the reform there have existed two schools of judges, the one favoring a broad and liberal interpretation of the statute, a construction in accordance with the spirit of the legislation, and tending to fulfil its evident purpose as a measure in the highest degree remedial; the other favoring a narrow and technical interpretation, which should restrict the operation of the statute to its mere letter, and which should construe its language in such a manner as to produce the least possible change from the ancient common law and equity methods of procedure. Although the latter school has at no time controlled the highest courts of more than one or two States, and although it is rapidly disappearing even from them, and has in form quite disappeared from all the others, yet the effect of its theories and methods may be perceived with more or less clearness throughout the whole course of judicial interpretation wherever the reformed procedure has been adopted. The second cause of the uncertainty and confusion above mentioned is the occasional want of consistency among the judges of the liberal school, and their failure in particular cases to maintain and enforce the principle of interpretation which they had approved and adopted in a general form; and this is the cause which has been most efficient in preventing the growth of a procedure consistent in all its parts, and carrying out in all its details the full purpose of the reform. Although from the operation of these two causes there is in the work of the courts, taken as a whole, much confusion and not a little direct conflict, still there exists the material from which a complete, systematic, and consistent theory of the civil action may be constructed. The antagonistic element introduced by the school of judges who were openly hostile to the new procedure was chiefly confined to the earlier years of the reform; and the decisions rendered under the influence of their opinions have been to a great extent overruled or displaced by later judgments, which more nearly express the intent of the legislature. The inconsistencies between the principles of interpretation announced in a general and comprehensive

manner, and the practical application thereof to the special instances and subordinate details of the civil action, are also gradually disappearing; the traditions of the past, and the ancient doctrines and methods of the common law, are passing away from the memory of the bench and bar, and a closer conformity with the fundamental conceptions of the reform legislation is plainly to be seen in all the States. While, therefore, among the decisions which have been pronounced since the inauguration of the American procedure in New York in 1848, there are many, even of the highest courts, which must be rejected as utterly wrong, and as opposed to the very letter of the codes, and very many others which must be taken with extensive and important limitations; yet from the materials thus furnished by the tribunals of the several States, from a combination and comparison of their results, the true doctrines and correct rules relating to the civil action may be ascertained, collected, and arranged in such a manner as to present a complete system,—a system that shall represent the spirit and design of the reform legislation, and that shall at the same time be founded, not upon any mere speculations of the author, but upon the solid and sure basis of actual judicial authority and precedent.

§ 36. As the abolition of the distinctions between actions at law and suits in equity is a fact so broad in its nature that within it are included all the other essential features of the civil action, its full significance must be accurately determined, if possible, at the very commencement of our contemplated work. I have shown in a preceding paragraph that, at a stage in the historical development of the Roman law, the “ordinary” jurisdiction of the magistrates was abolished, and all forms and species of judicial controversies were combined in the “extraordinary” jurisdiction. The result of this change was a complete amalgamation and unification of law and equity, so that the Roman civil law, as it is embodied in the Codes of Justinian, presents no trace of the dual nature which characterizes our own and the English jurisprudence, and which did at one time characterize that of Rome. The codes of procedure do not attempt to effect so radical and sweeping an alteration; the distinctions between law and equity are not abolished; these two departments of the municipal law, comprising their distinctive and peculiar primary rights and duties, and furnishing their special remedies, are left un-

touched by the legislation, and it is plain that they cannot be consolidated into one so long as the jury trial is preserved and made compulsory. While the change does not extend to the groups of rights and duties themselves which are collectively called "law" and "equity," nor to the remedies which have been used in maintaining such rights and duties, but is entirely confined to the judicial instrument by means of which the remedies are sought after and obtained, in its operation and effect upon that instrument it is *complete*. All distinctions between the action formerly used to enforce equitable rights and obtain equitable remedies and those formerly used to enforce legal rights and obtain legal remedies are removed; and one judicial proceeding, with the same essential principles and features, is to be used in enforcing all species of rights and obtaining all kinds of remedies. The revolution thus made in the ancient modes of procedure was radical and thorough; it was startling and, in fact, shocking to lawyers who were familiar only with the notions and methods of the common law. Irrespective of its remote effects upon parties, pleadings, and judgments, the immediate and direct consequences of the change involve the combination of legal and equitable causes or rights of action, legal and equitable defences, and legal and equitable reliefs in one single suit. If, therefore, this fundamental principle introduced by the codes be honestly followed to its logical results, if its spirit be faithfully accepted as the true and only guide in the work of constructing a system of practical rules for the bench and the bar, there should be no such distinctive names used in legal terminology as "legal action" and "equitable action," certainly no "action at law" or "suit in equity," since with strict accuracy of expression no action can be considered in itself as either legal or equitable; but, to avoid an inconvenient circumlocution, these descriptive names will doubtless be retained. Among the topics embraced in the discussion of the general principle are the union of legal and equitable primary rights or causes of action in the same controversy, the union of legal and equitable reliefs or remedies, the granting an equitable in place of a legal relief or a legal in place of an equitable one, the interposition of an equitable defence to a legal cause of action, and the obtaining a legal remedy upon an equitable primary right or estate. All of these special features are included within the broad principle which the reformed procedure

adopts as its very foundation ; and in developing a complete theory of the civil action they must be exhaustively discussed, with all the aid which can be obtained from judicial decisions. When the fact is fully apprehended that the distinctions between actions at law and suits in equity are abolished, and that there is but one civil action for the maintenance of all rights and the pursuit of all remedies, and when the subordinate elements directly connected with and resulting from this fact are clearly perceived, all real difficulties at once disappear ; the entire system of doctrines and rules concerning the nature of the civil action, and its use as an instrument for remedial purposes, is seen to result as a natural and necessary consequence from this one source, and to be scientifically perfect as well as practically efficient in its completeness and unity.

§ 37. Immediately connected with the abolition of all distinction between legal and equitable actions is the abrogation of the common-law forms of action. A single civil action sufficient for all purposes requires both of these modifications. No real difficulty can arise in giving effect to this particular provision of the codes. The common-law divisions of actions were, to a very great extent, arbitrary and formal ; they could easily have been abandoned while the more substantial line of separation between the action at law and the suit in equity was preserved. While the courts have never hesitated nor suggested a doubt in the enforcement of this special legislative enactment, its full meaning has sometimes been misapprehended. Individual judges have declared that all the ancient legal actions still exist in their substance, with simply the loss of their names. This is, of course, a palpable error ; for all the marks which distinguished one action from another—for example, “covenant” from “debt” or “assumpsit,” or “trespass” from “case” or “trover”—were external, technical, and formal, and have been swept away. The rights of action remain, and the remedies which could be recovered by the use of any particular action may still be secured by means of the civil action which the codes have substituted in the place of all the previous forms ; when under given circumstances an injured party might, by resorting to some one of the various actions at law, have obtained a judgment for land, or chattels, or money, he can, under exactly the same circumstances, recover a like judgment by the means which the reformed procedure furnishes to him.

To this extent, and no further, whatever was substantial in the old forms of action has been preserved. If the letter and the spirit of the codes are obeyed, all the rules of procedure which were based solely upon the technical and arbitrary differences of *form* among the ancient common-law actions must be regarded as abrogated with the actions themselves.

§ 38. The other essential elements or features which belong to the civil action, and inhere in its nature, which determine what it substantially *is*, rather than indicate how it must be prosecuted through the courts, are the parties, the mode of presenting the affirmative subject-matter, or cause of action, by the plaintiff, the mode of presenting the defensive subject-matter by the defendant, and the nature and form of the judgment. The doctrine of parties is of great practical importance; and it is the one concerning which there has been by far the most confusion, uncertainty, and contradiction among the decided cases. The common-law and the equity theories of parties stood opposed to each other in sharp contrast; the legal rules were clear, well defined, and intensely technical and arbitrary. In their place the codes have substituted a few broad principles, stated in a very general form without exception or limitation, which are conceded to be a statutory enactment of the doctrines which prevailed in courts of equity. If these provisions of the statute are accepted according to their literal import, and are applied to the civil action when used for any and all purposes, for maintaining a legal as well as an equitable right, a complete revolution will be wrought in the judicial methods of enforcing legal duties and pursuing legal remedies; all civil actions, so far as concerns the parties and the rules which control their selection, will be assimilated to suits in equity. This total change in the nature of actions has been regarded with disfavor by the judicial mind; and the courts have, on the whole, failed to carry out the plain intent or even the letter of the statutory requirements. Some judges have boldly taken the ground that these general provisions of the codes can only be applied to equitable suits, and that legal actions are left under the operation of the common-law doctrines. Other judges, while admitting that the equity doctrine, as to parties, has been introduced as a constituent element of the new procedure, have shrunk from its application in numerous instances, and a confusion without rule or guide has been the inevitable result.

If the object of the reform is to be accomplished ; if simplicity, certainty, and directness are to be attained in the modes of procedure ; if controversies are to be determined upon their merits, and not upon any collateral and technical issues, — the uncertainty which now exists to so great an extent concerning the parties to the civil action must be removed, and some plain and correct principle must be firmly settled and invariably applied. In arriving at and establishing this universal principle, two alternatives only are possible. The provisions of the codes may be confined exclusively to equitable actions, and legal actions may be left under the control of the ancient common-law rules, so that no change whatever in relation to parties would be effected by the reformed procedure ; or these provisions may be followed in their letter and their spirit, and rigorously enforced alike in all species of actions, in which case the common-law rules, so far as they differ from the equitable, would be entirely abandoned, and would wholly disappear from the system of procedure. The former of these alternatives is possible ; but it would be an act of judicial legislation, a substantial repeal of the statutory enactment. The second is in plain accord with the spirit and even letter of the codes ; although it involves a bold departure from some of the most distinctive notions of the common law, it is nevertheless entirely practicable and even easy of accomplishment.

§ 39. The mode of presenting the affirmative subject-matter or cause of action involves both the general principles of pleading introduced by the codes and their special application on the part of the plaintiff. The theory of pleading contained in the new procedure is often, and perhaps generally, regarded as the most important element of the reform, as the central thought from which all the other portions of the system have been derived. As already stated, I consider this to be an erroneous opinion. Having once established the fact of a single civil action adapted to all rights and remedies, and having abolished the distinctions between legal and equitable proceedings, the method of pleading was a natural and, indeed, necessary result. It is in the pleading, however, that this primary conception of the reformed system of procedure is realized and made practical ; and the two are so mutually dependent, so closely united, that they cannot be separated, and each exhaustively discussed by itself. The theory of pleading, according to the new procedure, is perfect in its scientific

character and in its practical efficiency. It is simple, easy to be understood, and true to nature. If its principles are fully understood, no difficulty whatever can arise in their application. It must be conceded, however, that in some of the States the prevailing methods of pleading fall far short of this ideal, and are, in fact, justly exposed to every possible objection. There is no method, no system, no rule; the pleadings themselves are long, filled with redundant and irrelevant matter; the issuable facts are not averred; the issues are not single, and are often buried and concealed by unnecessary details of mere evidentiary matter. In short, the purpose of the reform legislation, as expressed by its authors, appears to have completely failed. Must this result be attributed to faults inherent in the system? Most emphatically, no. The condition which I have thus briefly described exists in certain States, not because the principles of the new procedure have been carried out into practice, but because they have been utterly overlooked, neglected, and abandoned. Although these imperfections in the actual modes of pleading under the codes are far too common, the remedy is simple and easy. It is possible to construct a system based upon the plain text of the statutes and upon its correct judicial interpretation, which shall express the thought of the law-makers and accomplish the purpose which they had in view. Whatever conflict of opinion there may have been at an early day among the judges, there is at present a remarkable uniformity in their announcement of general doctrines; and the failure on their part has rather been in applying these doctrines to particular cases and in enforcing their observance upon the bar. The reformed theory of pleading, when rightly understood, and when its principles are faithfully followed in the practical administration of justice, tends to create singleness, clearness, and unity in the issues; and in these particulars it actually excels the boasted common-law method of special pleading. The study of this theory demands an investigation of the general principles which lie at its foundation, and does not require an acquaintance with any prescribed forms. Since all the arbitrary and technical dogmas of the common-law procedure have been abandoned, the art of pleading has been made a department of the broader art of narrative composition. To construct a perfect pleading, according to the ideal of the codes, requires (1) an accurate knowledge of the law, — that is, of the

primary and remedial rights and duties of the parties under any given circumstances; (2) a familiarity with the facts of the particular case, which involves the discriminating with certainty between those facts that are material and issuable and those which are evidentiary; and (3) the ability of writing the English language, to the extent at least of composing a clear, distinct, and brief narrative of these material facts, in such manner that the legal rule which they involve shall be inferred from them with certainty. The first and second of these elements constitute the principles of pleading so far as they form a part of procedure and of juridical science; the third belongs to rhetorical science, and its connection with the law is simply accidental. It is very evident from this analysis that the forms and precedents of pleadings play a much less important part now than they did in the ancient system. When the success of litigant parties depended upon an absolute compliance with technical rules and upon an accurate recital of certain arbitrary and technical phrases,—when, in fact, the pleader must rely upon his memory more than his reason,—the use of well-established and approved forms was proper, and, in fact, necessary; but since these features no longer disfigure the civil action and disgrace the administration of justice, the lawyer is not forced to consult such guides; if he has mastered the principles of the art, he needs only to cultivate his power of expression and composition in order to render himself an adept in pleading.

§ 40. The proper mode of presenting the defensive subject-matter of the action, in addition to these general principles which are common to all pleadings, embraces certain features which are peculiar to the defendant's contention. By combining all the defensive elements which the codes provide, the general and specific denials, the allegations of new matter, and the claims of affirmative relief, the reformed theory far excels in scientific completeness and in practical efficiency the common-law methods which have been so highly extolled by their advocates as the perfection of logic applied in judicial affairs. Here, again, the actual practice in many States has fallen far short of the ideal presented by the legislation; but here, also, the defect is not in the system itself, but results from a failure to apprehend its principles and to enforce its doctrines. The full discussion of this feature of the civil action involves the following subordinate

topics: the use of the specific or the general denial in the formation of issues; the office of the specific denial in the raising of single issues, and its analogies with the special traverse; the office of the general denial, its contrast with the common-law general issue, and the defences which it admits; the doctrine of new matter, and the distinctions between it and the ancient plea in confession and avoidance; the union of different defences in the same answer, and herein of equitable defences interposed to legal causes of action; and the recovery of affirmative relief by the defendant, which includes the special subjects of counterclaim and set-off. The full force and effect of the denial, both specific and general, its power to raise single and definite issues, its superiority to the general issue, and the defences which it admits, are subjects of the highest importance in the judicial practice, but have been too much neglected, both by the courts and by the bar. In developing the reformed procedure into a definite system, the rules which determine the nature of new matter and the effect of the general denial, are more uniform, accurate, and scientific than the analogous rules of the common law, which related to the general issue and the use of special pleas by way of confession and avoidance; and in this respect the superiority of the new system over the old can be shown beyond the possibility of doubt. Some of the defensive elements belonging to the civil action are entirely original. The doctrine of counterclaim, for example, is not a mere extension of the set-off and the recoupment of damages; it is a wholly new and independent conception; and, although objected to and even derided by the early opponents of the reform, it has been bodily adopted in the recent modification of the English procedure, and greatly enlarged in its scope and operation.

§ 41. The last of the distinctive elements or features which constitute the civil action is the judgment. In thus designating it as a constituent of the action, I do not refer to the very relief which is granted to the litigant parties, — the recovery of land, chattels, money, or other special benefit. Such final recovery is the *remedy* to obtain which the action is prosecuted, and, strictly speaking, forms no part of the action itself, but is rather its object or result. The questions which arise in connection with this branch of the civil action do not, therefore, relate to the final right established by the judgment and the relief secured by

it, but to its nature and form *as a part of the judicial proceeding*, and especially to the modifications made by the codes in the common-law doctrines concerning its unity and indivisibility. The equitable and the legal theories of the judgment, like the same theories of the parties, were in marked contrast and opposition to each other. In equity it was possible, and, indeed, common, for a decree to be rendered which discriminated among the plaintiffs or the defendants, and pronounced in favor of some against the others without regard to any unity or identity of right or interest. The object of the adjudication was to determine the entire controversy according to the individual rights of all the litigants; and if they were before the court as parties to the suit, so that they would be concluded by the decision, it was not of vital consequence whether they were plaintiffs or defendants. In short, the Court of Equity had full power to sever in its decree, to adjudge in favor of some plaintiffs and against others, in favor of some defendants and against others, to confer relief upon the defendants or some of them against the plaintiffs or some of them, and finally to settle the equities among the co-plaintiffs or the codefendants as against each other. The common-law theory of the judgment was in every respect different from this. Based upon the intensely arbitrary notion of joint rights and obligations, it regarded the demand of co-plaintiffs on the one side, and the liability of co-defendants on the other, except in a certain well-defined class of cases, as a unit, as utterly incapable of being severed, as something which must be established as to all, or must fail as to all the parties. In no instance was affirmative relief granted to the defendant; recoveries by plaintiff against plaintiff, or by defendant against defendant, were unknown. Since the right of the plaintiffs or the liability of the defendants was conceived of as one and indivisible, the recovery must be against all the defendants equally and in favor of all the plaintiffs alike. As a general rule, therefore, independent of statute and of the few excepted cases, the judgment in a common-law action could not be severed, and be pronounced in favor of some plaintiffs and against the others, nor in favor of some defendants and against others. No principle of the common-law procedure was more firmly established than this; and it represented all the technical and arbitrary notions which characterized the entire system. The codes are unanimous

in their dealing with this subject. In the most direct and comprehensive language they reject these narrow dogmas of the law, and establish the liberal doctrines of equity, which they apply to the civil action without exception or limitation. The statutory provisions are so clear, definite, and certain that no reasonable doubt as to their scope and meaning is possible. Although the purpose of the law-makers, and the theory of their legislation, are so plainly expressed, the courts have hesitated and halted in giving effect to this intent and in carrying out this design. The change made in the ancient order of things is so radical and sweeping that judges sometimes shrink from its contemplation, and seem to regard the statute as though it could not mean what its language declares. This evasion or ignoring of the legislative will has by no means been universal. In many States the courts have conformed to the letter and the spirit of the codes, and have by their decisions established the true principles which can and must be adopted and used in constructing and arranging the practical rules of procedure that regulate the recovery of judgments by means of the civil action.

§ 42. Having described the distinctive elements and features of the civil action which determine its peculiar nature as a judicial instrument for enforcing remedial rights and obtaining remedies, I shall, in conclusion, sketch the plan of the present volume and state the order which will be pursued in its discussions. The general subject of which it treats may be properly styled "The Civil Action according to the Reformed American Procedure." The remaining portion of the work is divided into five chapters, which follow the order of topics already indicated in the preceding paragraphs; and these chapters are again separated into sections and other minor subdivisions. *Chapter First* is an exhaustive discussion of the fundamental principle upon which the new procedure is based, — the abolition of the distinctions between actions at law and suits in equity, and the doctrine of the unity in form and nature of the single civil action created by the codes; *Chapter Second* treats of the parties to the civil action; *Chapter Third*, of the presentation of the affirmative subject-matter or cause of action by the plaintiff; *Chapter Fourth*, of the presentation of the defensive subject-matter of the action, including the recovery of affirmative relief by the defendant, either by counter-claim, cross-complaint, or set-off; *Chapter Fifth* treats of

the judgment especially in its relations with the parties. By pursuing the order here indicated the theory of the civil action, so far as it involves doctrines and principles peculiar to the reformed procedure, is presented in an exhaustive manner.

§ 43. In carrying out the plan which has been explained in this introductory chapter, my object has been to furnish for the bar and the bench a treatise which may be useful to them in their professional labors, and for the students of law a text-book which may aid them in acquiring a knowledge of the reformed procedure in all of its essential and fundamental principles. To this end the work is entirely based upon the text of the codes and upon the decisions of courts which have interpreted that text. In no instance have my own opinions or speculations, unsupported by authority, been stated as established rules; whenever such opinions are given, their proper character is plainly indicated. Among the vast number of decisions, many of them conflicting, I have endeavored to distinguish between those which repudiate or neglect the legislative intent and those which follow and give it effect; and upon the basis of the latter class I have attempted to construct a symmetrical and harmonious system which embodies the true principles of the reformed procedure.

PART FIRST.

THE CIVIL ACTION ACCORDING TO THE AMERICAN SYSTEM OF PROCEDURE; ITS ESSENTIAL PRINCIPLES AND FEATURES.

CHAPTER FIRST.

The Principle of Unity in all Judicial Proceedings; Abolition of the Distinctions between Actions at Law and Suits in Equity, and of all the Common-law Forms of Action; Adoption of a Single and Uniform Judicial Instrument called the Civil Action, by which the Remedies known to the Law are to be obtained, and the Remedial Rights are to be enforced.

§ 44. THE following is the form of the simple but most comprehensive provision found in the codes of procedure and practice acts, embodying the fundamental principle which is the subject-matter of the present chapter, and which is the single source from which all the other portions of the system flow as necessary consequences: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."¹ In a very few of the States the change from the former modes is not so complete, and a slight distinction is preserved between

¹ N. Y. § 69; Cal. § 807; S. C. § 92; Nev. § 1; Neb. § 2; Kans. § 10; Ohio, § 3; Ind. § 1; Minn. Stat. at Large, ch. 41, § 1; Mo. Wagner's Stat. ch. 110, art. 1, § 1; Wisc. R. S. ch. 122, § 8; Flor. § 49; N. C. § 12; Dakota, § 22; Idaho, § 1; Wash. § 2; Wyoming, § 3; Montana, § 1; Arizona, § 1. The provision in the latest Revision of the California Code (1872) is as follows: "§ 807 (§ 1). There is in this State but one form of civil actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs."

In several of the States the language of the section differs slightly from the form given in the text, the last clause, after the word "abolished," reading as follows: "And in their place there shall be hereafter but one form of action, which shall be called a civil action."

The provision of the Missouri, Nevada, Idaho, Montana, and Washington codes is the same in substance and almost identical in language with that quoted above from the California statute.

suits brought to obtain legal and those brought to obtain equitable relief. All the common-law forms of action are abolished, and one civil action is established for all remedial purposes: the proceedings in this civil action, however, may be either (1) ordinary or (2) equitable. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of the code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive. In all other cases the plaintiff must prosecute his action by ordinary proceedings. The plaintiff indicates by the formula, "In ordinary proceedings," or "In equitable proceedings," at the commencement of his petition or complaint, to which class the action belongs. The provisions of the code regulating the prosecution of actions apply to both kinds of proceedings unless the contrary expressly appears. In fact, the only real distinction between them is that they are to be placed upon different dockets of the court, so that the suits of the one class will be tried by a jury, while those of the other class will be tried by the judge without a jury, and the evidence in equitable proceedings may be taken by deposition instead of by oral examination in open court.¹ It is evident that in these States the difference kept up between legal and equitable actions is more nominal than real, and that the principle of absolute unity prevails as truly in their codes as in those of the other commonwealths. As this principle of unity in all civil judicial procedure, of a single instrument by which remedies may be obtained, rights asserted, and duties enforced, lies at the bottom of the entire system; as this particular doctrine has given rise to a great conflict of opinion and of decision; and as a failure to apprehend its exact import, extent, and limits must inevitably defeat the beneficial results which the reform was intended to produce, — I shall at the outset examine it with care, and shall endeavor to ascertain the true intent of the law-makers, and how far that intent has been followed and carried out by the courts. That the discussion may be exhaustive, and may present the subject in all its phases, the present chapter will be separated into the following sections: Section I. A theoretical unity, or the theory of an absolute union of legal and

¹ Ky. §§ 1-18; Iowa, §§ 2507, 2508, 2518, 2514, 2520; Oregon, §§ 1, 876.

equitable actions. I shall, in the subsequent sections, inquire how far this theory has been adopted by the legislatures, and to what extent the courts have gone in combining the legal and equitable methods of administering remedial rights, viz.: Section II. The general principles as to the union of legal and equitable methods which have been announced by the courts. Section III. The union of legal and equitable causes of action and remedies in one suit. Section IV. The setting up of equitable defences in legal actions. Section V. The bringing a legal action based upon an equitable primary right. Section VI. The nature of actions, and the essential distinctions among them.

SECTION FIRST.

A Theoretical Unity in Procedure; or the Theory of an Absolute Union of Legal and Equitable Actions into a Single Judicial Instrument for the Enforcement of all Remedial Rights and the Obtaining of all Remedies. L

§ 45. To aid us in determining just what the statutes, and the courts in construing them, have done in the way of reducing all forms of judicial action to one, we may properly inquire what is the pure ideal or theory of such a unity. We may assume that the legislature had before them in contemplation such an ideal or theoretic scheme; and if we can by any *a priori* reasoning, by any inferences drawn from the very nature of the subject-matter, arrive at this theoretic conception, we shall certainly have done much towards ascertaining the ultimate legislative intent. Whether the legislature has by apt language and by sufficient provisions worked out and expressed this intent in a complete manner, is another and very different question. It is very possible, and in fact probable, that the law-makers had before them an ultimate object conceived of with some clearness and distinctness, but that they have fallen far short of reaching that object. In seeking to discover this supposed ideal or theory, the following questions must be considered and answered: What is an absolute and complete union of legal and equitable methods and actions, so that one judicial instrument should be sufficient for the enforcement of all remedial rights and the obtaining of all remedies? How far is such a complete and absolute unity possible? What features and elements in the nature of primary

rights and of remedies, if any, stand in the way of such a result? What features and elements, on the other hand, tend to make such an amalgamation practicable? In order that these questions may be properly discussed and correctly answered, we must, in the first place, obtain a clear and accurate conception of equity itself. In what does equity consist? What are its constituent parts? In what respect does it differ from the other great branch of our jurisprudence, which is termed the common law, or "the law"? It must be confessed that great confusion exists in respect to these elementary and fundamental notions. We are familiar with the terms "equity" and "law;" we constantly speak of equitable and legal rights, causes of action, and modes of procedure; and yet very little attempt has been made by even the best writers to point out the exact elements of distinction between the subjects of which we so frequently speak. The historical origin and growth of equity jurisprudence have been sufficiently illustrated in the introductory chapter. As the final result of this growth, the municipal law of England and of the several States was separated into two divisions or branches, each administered by different tribunals, and each conferring different remedies or reliefs. Are these two divisions or branches antagonistic to each other, or are they simply complementary, or does one merely occupy a sphere which the other does not? Are the primary rules, rights, and duties embraced in the department of law different from the primary rules, rights, and duties which are embraced in the department of equity; or does the distinction lie solely in the remedies and remedial rights which arise from the violation of the common primary rules, and in the judicial processes by which these remedies are obtained? These questions present themselves, and must be answered, if we would determine the exact nature of equity as distinguished from law. I cannot reply to these inquiries in detail; to do so would require an exhaustive treatise upon equity jurisprudence. I can only give general results, and illustrate these conclusions by a few familiar examples, leaving it to the reader to pursue the illustration through the entire domain of equity.

§ 46. Applying a thorough analysis to this department of the municipal law, examining the essential nature of each practical rule and principle contained in it, equity as a whole, and so far as it is different from the law, is resolved into and consists of the

following constituent parts; namely, *first*, certain primary rules, with the primary rights and duties flowing from them, irrespective of the remedies, which are different from the primary rules upon the same subject-matter, with the primary rights and duties flowing therefrom, which are contained in the law; and, *secondly*, certain remedies which are known and conferred, irrespective of any distinction in the primary rules and rights for whose violation the remedies are granted. The peculiar feature of equity, which distinguishes it as a department from the law, does not consist solely in the fact that remedies are known and used by it which the law does not know and use, nor solely in the fact that there are primary equitable rights and duties, irrespective of the remedies, different from any at law, but in both of these facts combined. These propositions can be made plain by a few illustrative examples. *First*, equity as a department contains certain primary rules, with the primary rights and duties flowing from them, different from any rules upon the same subject-matter embraced in the law. In this proposition we disregard for the present the remedies which are given for the violation of primary rights; and we might assume, for the purposes of the discussion, that the remedies, the reliefs, given by equity were exactly the same, no more, no less, and no other than those given by the law, whatever might be the nature of the primary right broken; that is, that equity could give no judgments except the recovery of possession of lands or chattels, or the recovery of a sum of money. Upon that hypothesis there are primary equitable rights in relation to particular subject-matters quite different from the primary legal rights in relation to the same subject-matters. In reference to most of these it would be proper to say that they are *additional* to those which exist at law; they do not contradict, they are not antagonistic to, any rules upon the same subject-matter which the common law provides; but they are supplementary, touching upon particulars in reference to which the law is silent. Between this class of equitable rules and the corresponding legal rules, there is therefore no conflict; each is absolutely true in all places and at all times; the equity courts recognize and administer one, the law courts recognize and administer the other, without *clashing* or discord. But in respect to another portion of these primary equitable rules and rights it must be said that they

are not merely additional to, but are in conflict with, the legal rules and rights upon the same subject-matter ; between this class of equitable rules and rights and the corresponding legal rules and rights there is therefore an antagonism ; the equity courts admit and uphold a particular right as growing out of a particular condition of circumstances which the law courts not only refuse to recognize, but which they would deny and oppose. To this extent there is a contrariety and discord between the two departments of the municipal law, which cannot be concealed, but which has gradually grown less and less, and which will finally disappear.

§ 47. A few examples will illustrate these statements. At an early day the common-law rule was peremptory that the liability of the obligor upon a sealed undertaking, like a bond, could only be discharged by an instrument of the same legal value ; that is, by a sealed release or acquittance. Mere payment, although evidenced by a written receipt, was not enough. The compulsive efficacy of the seal could only be overcome by an act of a legal nature equally high. If, therefore, the debtor on a bond had paid the demand in full, and had even taken a written receipt therefor, but had failed to procure a surrender of the obligation into his own custody, or a release of his liability thereon, the creditor might still sue in a common-law action on the bond, and the law gave no defence ; the law said, in fact, that the liability still existed ; the primary right of the creditor and the primary duty of the debtor remained unchanged. In the course of time the equity courts intervened ; and this was one of the first steps which equity took in its long march towards the present completed results. The debtor upon the above-mentioned facts existing, by commencing a suit in chancery, would obtain the remedy of an injunction perpetually restraining the creditor from the prosecution of his common-law action, and perhaps the remedy that the bond should be surrendered and cancelled. It is not the form of remedy at which I now wish to look, but at the *primary equitable right* for whose maintenance the remedy was contrived. Plainly the primary right and duty which equity here conferred upon the creditor and the debtor respectively were diametrically the opposites of the primary right and duty which the law conferred upon the same persons. The law said the original right of the creditor and duty of the debtor

were exactly the same as though the bond was in full force after default in payment. Equity said this original right of the creditor and duty of the debtor had been absolutely changed and destroyed, that the liability on the obligation had ended, that the duty of the obligor to pay had gone, and that in its place a right had arisen that the evidence of such payment and discharge should be made perfect by the acts of the obligee. It would be a mistaken view to assert that equity here simply granted a remedy to the debtor which the law did not give. Remedies are not conferred by equity courts any more than by law courts, unless there is a primary right and duty which has been violated, and from the breach of which a remedial right and duty arises. In the case supposed, the law most emphatically said the primary right of the creditor upon the bond still existed unaffected, and the primary duty of the debtor remained undiminished, and gave the legal remedies to enforce the same. Equity as emphatically denied all this, and asserted that there was no such primary right or duty left in existence. There was, therefore, a plain and direct conflict in the primary rights and duties which flowed from exactly the same facts and circumstances. This is a simple illustration of the class of equitable primary rights and duties which are opposed and antagonistic to the corresponding primary legal rights and duties. It is true this *particular* antagonism no longer exists. Either by means of the gradual adoption of equitable principles by the common-law courts or by means of statutes, the same rule as to the discharge of a sealed obligation applies in law as in equity, and the defence of payment and discharge can be set up in a legal action ; but this does not lessen the appropriateness of the illustration.

§ 48. If we carefully analyze the whole body of equitable primary rules, we shall find but few in which there is any direct conflict with the legal rules relating to the same subject-matter. In many instances where there was once such contrariety, we shall discover that the law has been changed from its original arbitrariness, and has been made to conform with the equitable doctrine. Another example will illustrate the large class of equitable primary rules and rights which are simply additional to those recognized by the law. A. enters into a contract in writing by which he agrees to convey to B., by a good and sufficient deed, a parcel of land, upon being paid the purchase price in a

stipulated manner; the price is paid, and A. refuses to convey. Or, again, A. receives from B. a sum of money under an authority and agreement to purchase therewith for B. a parcel of land, taking the deed to the latter; he purchases the land with the money, but takes the conveyance thereof to himself. In the first case the law sees nothing but a contract, and the rights which flow therefrom. B. has a right *in personam* against A., but no right *in rem*, no right of property in the land. There has been a violation of contract; and the law, regarding no other relations between the parties, gives to B. the remedy of compensation. This primary personal right, and also this remedial right, would, upon the death of B., pass to his administrators or executors. Equity, applying the great principle of regarding as done what ought to have been done, clothes B. with another and broader primary right additional, but in no wise antagonistic to that which the law creates. It says that B. has acquired a right *in rem*, a right of property in the land, an ownership which is called *equitable*, it is true, but none the less an actual ownership. The land is B.'s, and not A.'s; and the proprietary right upon B.'s death descends to his heirs, and is subject to the dower of his widow. There is nothing here contrary to the legal view; because while equity gives to B. a property in the land, and furnishes him with remedies appropriate to maintain and secure that proprietorship, it does not deny nor override his *legal* right; the latter is left in full force and effect. In fact, B. has an election. Relying upon his mere *personal* right flowing from the contract, he or his executors or administrators may sue in a court of law to recover damages for a violation of the agreement; or, relying upon his *real* right, — his ownership of the land, — he or his heirs may sue in a court of equity, and have his proprietorship established, the legal muniments of his title perfected, and the possession transferred. In the other supposed case there is a contract and a fraud. The law still sees nothing but a *personal* right growing out of the deceit and the fraudulent violation of the agreement; while equity, not denying that, recognizes also a *real* right in the land, treats B. as the owner thereof, and enables him to establish that ownership, and to obtain possession. It is a glaring error to suppose, as does a recent English writer on the principles of equity, that in these and similar instances equity only furnishes different remedies from those known to the law.

I repeat, there can be no remedy without a primary right violated ; and it is undeniable that equity conceives of B. as clothed with a primary right of property in the land altogether unlike the personal right arising from contract only, which the law admits. The truth of this proposition is demonstrated by the single fact that in one instance the right passes to heirs as an inheritance, and in the other to the administrators as a thing in action. It is true the equitable estate is in certain respects inferior to the corresponding legal estate ; but it is an estate which can be transmitted, and is *between the immediate parties* as perfect as an estate in law. These examples sufficiently illustrate my position, and the very large class of cases in which equity supplements the law within the domain of primary rights and duties.

§ 49. *Secondly.* In the second place, equity, as a department of the entire municipal law, consists of the remedies which it confers upon litigant parties. Viewing the subject in this aspect, we disregard, for the time being, the nature of the primary rights on account of whose violation remedies become necessary ; and we might assume it to be true, so far as the present inquiry extends, that the primary rights which equity acknowledges and maintains are exactly the same as those acknowledged and maintained by the law. The peculiarity of its remedies, as compared with the kinds of relief given by law courts, is undoubtedly the most prominent feature of equity, and is so striking that some writers have spoken of equity as consisting alone of remedies and remedial rights. This opinion is certainly erroneous ; for, important as are the remedies which it furnishes, they necessarily assume some primary right which has been broken. These various elements will appear from a simple analysis. A certain physical act or transaction occurs ; one person makes an agreement to convey his farm to another upon payment of the purchase price. This is the fact, the transaction ; and it remains the same, whatever rules of law relate to it, or rights arise from it. The common law, as we have seen, recognizes a primary personal right in the vendee and duty in the vendor, growing out of the contract, and from their violation admits the remedial right to compensation, and the remedy of damages. Equity from the same facts recognizes in the vendee a primary real right over the land, an equitable property therein ; and in order to protect this ownership, which is from its nature imperfect,

it must contrive some remedy entirely different from that given by the law. The remedy of damages is fitted to and sufficient for the legal personal right of contract, but is utterly unfitted to and insufficient for the equitable real right of property in the land. The new remedy of specific performance is therefore based upon this equitable primary right, and is made necessary by it.

§ 50. The remedies themselves which equity administers are, in their relation to the law, of three distinct kinds : (1) Those which are utterly different from any that are known and used in the legal procedure ; (2) Those which the legal procedure recognizes, and the benefits of which it obtains in an indirect manner ; (3) Those which are the same in substance and form, both in equity and law. Here, again, a few examples will do all the work of an exhaustive analysis. The classes to which all common-law remedies may be reduced are few and fixed ; but in equity there is no positive limit to the variety of relief which the court can grant, suited to the innumerable changes of circumstances that may arise. The classes of legal remedies are but two, — the recovery of possession of specific things, lands or chattels, and the recovery of a sum of money. In the first of these two classes must be included the special common-law methods of partition, admeasurement of dower, and the like, which are, in fact, recoveries of the land. Of the innumerable varieties of equitable reliefs, there are many which have no resemblance whatever to either of these two classes, nor to any particular instances embraced within them ; among them, the preventive remedy of injunction, the restorative remedy of mandatory injunction, applied in cases where physical obstructions are removed, the remedy of re-formation or re-execution, that of specific performance, and others which need not be specified. In the second place, there are equitable remedies, which the legal procedure does not grant directly, but the benefits of which it obtains and confers indirectly. A single example will suffice, and it is the familiar relief of rescission or cancellation. A court of equity entertains an action brought for the express purpose of procuring a contract to be rescinded, and renders a judgment which confers the exact remedy demanded by the suitor. A court of law entertains an action for the recovery of specific chattels or of money as debt or damages ; and

although nothing is said concerning it, either in the pleadings or in the judgment, a contract is actually rescinded, and the entire decision is based upon that fact. Here the remedy of rescission is not in terms asked for nor granted by the court of law; but all its effects and benefits are indirectly conferred in the legal action. A contract which had been entered into between the parties is regarded as cancelled and rescinded, or else no judgment for possession of the chattel, or for recovery of the money value or damages, could have been rendered. Finally, there is a class of remedies used by courts of equity which are identical in substance with those relating to the same subject-matter used by courts of law. Familiar instances of this kind are the damages which are frequently awarded in equitable actions as ancillary to the main relief; the partitioning of land among co-owners, and the admeasurement of dower to widows, in which the final relief is exactly the same as that conferred by the corresponding legal actions; the process of accounting and determining of balances in favor of one or the other party, the result of which is identical with that reached by the now obsolete common-law action of "account."

§ 51. Equitable remedies may also be examined in respect of another element which has a direct connection with the union of legal and equitable procedure into one uniform system. We may inquire, What of all the remedies which equity now admits and grants might possibly be administered by the courts of law through the means of purely legal methods, including the jury trial; and what, if any, cannot be thus administered, but require a continuance of the modes of procedure that are purely equitable? In accounting for the rise and growth of the equitable jurisdiction, it has sometimes been said that the whole proceeded from the inability of juries to pass upon any issues which were not reduced to the affirmance and denial of a single fact; that, as the ancient law courts had no power of deciding disputed facts except by a jury, a resort to other tribunals, which consisted only of one or more judges, became an absolute necessity in the large class of cases in which the facts were complicated, and the issues involved. There is in this account something of truth and much of error. What is the exact province of the jury in the trial of a common-law action? Its functions should not be confounded with those of the court. It

passes upon issues of fact, and announces its decision in the form of a verdict, which, at the present day and in this country, is with few exceptions a general verdict. Upon this verdict the court pronounces the judgment, or, in other words, awards the remedy which the law designates as appropriate. The jury has nothing to do with this remedy; its function is limited to the preliminary inquiry whether the litigant party is entitled on the facts to the remedy demanded; and, it having answered this question in the affirmative, the court completes the judicial proceeding, and grants the relief. Now, the nature of this remedy does not in the least depend upon the simplicity or the complexity of the issues of fact which the jury decides as a preliminary step; that issue may be single and simple, or it may be complicated and involved, obscure and difficult, as complex as any which are ever presented to a chancellor; but, when once determined, the judge awards the final remedy of pecuniary damage, recovery of lands, or recovery of chattels, as the case may be. It is perfectly clear, upon this statement of the jury's functions, that after it had performed its part, and passed upon the controversy of fact, the court might upon such decision award many other remedies now termed equitable with the same ease, the same propriety, and the same certainty that it now awards the legal remedies of pecuniary compensation, possession of lands, or possession of chattels. There would be nothing in the nature of the special equitable remedy conferred which would add to the labor of the jury, or increase the complexity of the issue which it must decide. Among such equitable remedies are injunction, specific performance, cancellation or rescission, re-execution or re-formation, and perhaps some others. It would certainly be within the power of a jury, for example, to determine whether a defendant was committing acts of waste, or of continuous trespass, or of nuisance, so that the court might grant a judgment for a perpetual injunction, or for a removal of the nuisance; or whether the defendant had entered into a contract to convey land which he refuses to fulfil, so that the court might grant a judgment for specific performance; or whether the defendant had been guilty of fraud in procuring a contract to be executed, so that the court might grant the remedy of cancellation; or whether the contract had been executed under a mutual error, so that the court might grant a judgment for re-formation. The jury could as easily and readily

pass upon these several issues of fact preliminary to the award of the special relief thereon as it could decide the same issues when they were to be followed by a judgment for pecuniary damages. I am not now arguing that a change in these respects would be an improvement: I am simply showing that there is nothing in the nature of many important and very common equitable remedies which necessarily removes them from the power of the law courts and from the province of a jury; the issues of fact upon which the remedial right depends may be determined by a jury, and the special relief thereon granted by the court.

§ 52. On the other hand, there are forms and kinds of equitable remedy which are so intimately and necessarily connected with the very processes of examining and settling the facts upon which the right to the relief depends, that a judicial determination of the issues in the common-law method by means of a jury is practically impossible. The experience of English and American tribunals has demonstrated the truth of this proposition. A single example is sufficient. The remedy of accounting, of taking, stating, and settling an account, and the ultimate balances payable to the litigant parties, although it results in a mere judgment for the payment of money in one or different sums, necessarily involves, under the various circumstances in which it may be used, a special kind of judicial labor which is utterly beyond the competency of a jury. In the same class is to be placed the marshalling of assets in all its forms and with all its incidents, and other remedies of a like general nature.

§ 53. The results of the foregoing analysis may be summed up as follows: Equity, as a distinct department of the municipal law, consists in part of primary rules and rights flowing therefrom different from the legal rules and rights relating to the same subject-matter, and in part of special remedies and remedial rights. A portion of these primary rules and rights are strictly antagonistic to and in conflict with those which the law would apply to the same facts and events, while the remaining portion are simply additional and supplementary to the corresponding legal rules and rights. The remedies which form so large an element in equity are divided in a similar manner; many of them are different in every respect from those conferred by legal tribunals; the beneficial effect of others the legal procedure procures in an indirect manner, while the residue are identical in sub-

stance and in their final form with the legal judgments which are obtained upon the same facts and for the same purposes.

§ 54. Having thus inquired into the essential nature of equity, and ascertained its constituent elements, we are enabled to discuss the theory or pure ideal of a union between law and equity with greater accuracy and certainty. The theory of a complete union or consolidation does not and cannot involve a change in the rules as to *primary* rights and duties, which form a most important division of equity. The entire municipal law now contains: (1) Legal rules defining rights and duties applicable to all the facts and circumstances which have been brought within the range of jural relations; (2) Equitable rules defining rights and duties applicable to certain determined classes of these facts and circumstances, which are additional and supplementary to the legal rules applicable to the same classes; and (3) Equitable rules applicable to a comparatively very small number of these facts and circumstances, which are really contrary and antagonistic to the legal rules applicable to the same. There is, therefore, no clashing or conflict, no doubt or uncertainty, as to the final absolute rights and duties of individuals, except so far as such conflict and uncertainty may spring from the existence of the very small number of rules in the third class, where the antagonism between law and equity does actually exist. It is certainly strange that in an age and country advanced in civilization the municipal law should present such an anomaly; it is certainly absurd, for example, that a married woman's contracts should be utterly void according to the doctrines of the law, while, according to the doctrines of equity, they may be valid and enforceable out of her property. If any change is to be made in accomplishing an absolute union, it must be in the legal and not in the equitable rules where this discord exists. The latter are confessedly the more just, and more in accordance with the sentiments and opinions of the age; while the former have become practically obsolete, and would be totally abandoned in any revision or codification of the entire jurisprudence. An absolute union, therefore, would leave in existence and in active operation all the rules of equity, which define primary rights and duties, and all the rules of the law, except those few in number which are directly opposed to some particular equitable doctrine or principle. The municipal law would thus be homogeneous

and unified ; and were it not for the distinction in the remedies, which would still remain, the names "law" and "equity" might be abandoned.

§ 55. The theory of an absolute union does not imply a change in or abolition of any remedies, either legal or equitable. The municipal law in the administration of justice, and for the purpose of maintaining the primary rights and duties of individuals, permits and uses (1) the remedies which the common law and the law courts contrived, and (2) those which equity and the equity courts contrived. There is no interference, no conflict, among them ; there is even practically no superfluity, for the legal remedies which are identical in substance with the equitable ones appropriate to the same circumstances have become obsolete, and exist only in theory. This system of remedies and remedial rights is not in any proper sense double ; it is single, uniform, and homogeneous, as far as homogeneity is practicable. The most that can be said is that under certain circumstances the injured party has, upon the same state of facts, an election among the different remedies offered him for his complete protection. Amid the infinite diversity of facts, circumstances, and relations which can occur in the movements of modern society, amid the endless variety of primary rights which must spring therefrom, and amid the countless forms which delicts or violations of duty may assume, it is impossible that the ultimate remedies and remedial rights should be reduced to any few and well-defined classes. Some classification, however, is possible, since it is possible to make some broad divisions of primary rights and of ordinary delicts ; and the law long ago took advantage of this possibility, and made the classification as simple and as comprehensive as the nature and condition of the subject then permitted. The result was the three established forms of relief which have been known as legal : the judgment for the recovery of possession of land, for the recovery of possession of chattels, and for the recovery of money. Beyond these the forms and kinds of relief must of necessity be special, adapted to the innumerable varieties of facts, circumstances, and relations. Instead of curtailing, abridging, or abolishing any known kinds of equitable remedy, new and additional ones must, from time to time, be invented to respond to new wants, facts, and relations. No legislation will be needed to effect the modifications and additions

which may become necessary in the progress of the social movement; for the courts possess the inherent power, which they have had and used from the earliest period, of meeting the new wants of to-day by means and instruments which had only a potential existence yesterday. We therefore, through this investigation into the very nature of law and of equity as correlative parts of one great whole, reach the conclusion, that a theory or pure ideal of a perfect union does not involve or admit the abolition of any equitable rules which define primary rights and duties, nor of any equitable remedies and remedial rights which now exist. If any change should be made within the domain of primary rights or in that of remedies, it would consist in abrogating those few legal rules that stand in opposition to acknowledged doctrines of equity, and those few legal remedies and remedial processes that have become obsolete, because equity, under the same circumstances, furnishes the identical relief in a simpler and more efficacious manner.

§ 56. The legislation which created the reformed American system of procedure is in exact harmony with these conclusions. Not a provision is to be found in the code of any state adopting the new system which requires, suggests, or even intimates an abrogation of equitable primary rights, or equitable remedies and remedial rights; nor, in fact, can a provision be found which expressly contemplates an absolute unification of law and equity into a single homogeneous whole. The change provided for is not in primary rights nor in remedies, but in the methods, means, and instruments by which these primary rights are to be maintained, and these remedies secured. Undoubtedly a removal of all distinction between these external means and instruments, as it must produce an identity of remedial methods, will tend to obliterate all marks of distinction between the two great departments of primary rights and duties which are called equity and law, and to reduce them in time to a condition of oneness; but this result is an indirect though natural consequence of the reform legislation, and is not expressly provided for by the legislation itself. The most explicit and positive language contained in all the codes, but three, is the following: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished." There is plainly no suggestion here of a change in primary rights nor

in remedies. "Actions" and "suits" and their "forms" are alone spoken of. Nothing is said even of a union between law and equity, and no hint is given of an alteration in the essential features of either, — in the rights and duties which it creates, or the remedies which it confers. It is a misapprehension not only of the spirit but of the plain letter of the code to suppose that it affects the constitution of the municipal law, or goes below the external forms of procedure, the judicial machinery by which the law is made compulsive in the enforcement of its commands. There is thus a perfect accord between the actual legislation and the theory which has been deduced from an analysis of the essential notions of equity and of law.

§ 57. As this theory does not contemplate a destruction of existing remedies, nor directly propose an immediate amalgamation of the two correlative departments of law and equity, and as it is confined to a union of external and formal methods, the question arises, What is meant by such a union of external and formal methods? How far is it possible, while retaining the primary rights and the remedies which have been called legal and equitable, to break down and destroy all distinctions between legal and equitable actions, and to construct a single judicial instrument for the prosecution of all civil remedial rights and the procuring of all civil remedies? It is my purpose, in the remaining portion of the present section, to give a purely theoretical answer to these questions, without reference to the terms of the positive legislation creating the reformed system of procedure. The absolute union or consolidation of external methods which is spoken of, regarded in its highest or ideal perfection, involves the notion of a single action by which to administer all remedies, legal or equitable, and to maintain all primary rights, which action should be the same for all species of relief, and under all possible circumstances. The sameness in this action, with reference to the proceedings therein and especially with reference to the legal or equitable remedies it is designed to confer, may consist in several particulars, which I shall examine separately, and in respect to each of which shall inquire whether an identity of method is possible.

§ 58. (1) There may be the perfect sameness in the manner of commencing the action under all circumstances, whatever be the nature of the remedy sought or of the primary right main-

tained. This feature of identity is certainly possible ; and it is, moreover, very easy of attainment. That the mode of initiating the proceedings, the forms and kinds of the process, may be the same for all actions and for all remedies, is too plain to require argument. Each of the codes contemplates at least this feature of identity, and no practical difficulty is found in carrying out the designs of the legislature. (2) The second feature of sameness may be in the method of stating all possible causes of action and of defence ; that is, in the pleadings. In other words, the design of the legislature in uniting all modes of procedure may be that, whatever be the remedy invoked, whatever the primary right violated, the acts and facts which constitute the right and the breach of it should be stated in the same manner and according to the same principles. Notwithstanding the conflict of opinion upon this particular point to be found in some of the judicial decisions, I believe that the feature of unity here described is not only possible, but that it is in complete accordance with the highest and most scientific theory of judicial procedure. It is of course impossible that in every case, legal or equitable, the cause of action or defence should be stated in exactly the same manner and form, since there must be essential differences among causes of action and defences which no legislation can efface. It is possible, however, that all causes of action and all defences should be set forth in accordance with the same principle. It has been said that the common-law and the equity methods of pleading were very unlike, and that even since the codes a legal action must necessarily be stated in pursuance of the former, and an equitable action in pursuance of the latter mode. Whatever the courts may have decided, this proposition is not true ; no such necessity exists. A single, uniform theory of pleading may be followed, and may be applied to every possible cause of action and defence. The common-law pleading did not state the facts exactly as they occurred, but rather the conclusions which the law inferred from such facts ; and in the most frequent of all actions — *assumpsit* — it constantly charged upon the defendant the making of promises which were entirely fictitious. The equity system stated the facts, but it overlaid them with an unnecessary mass of evidence, — unnecessary, I mean, as a statement of the cause of action or defence, and only useful as a means of making the party a witness in the cause either for or

against himself; and it used an abundance of technical forms which had lost all their significance. A theory of pleading which, in all cases and while seeking to obtain all remedies, should merely state the facts that constitute the cause of action or the defence, without legal inferences and without minute detail of evidence, would be the same in principle, however simple or however complicated the cause of action or defence might be. This would be at once the most practical and the most scientific method, and it would apply to every conceivable case. If the plaintiff in one action alleges the single fact of a sale out of which the defendant's liability arises, but does not aver any promise which was never made, the principle is the same as that which in another action requires the statement of the affairs of an insolvent partnership involving the most complicated accounts and marshalling of assets. In both these instances the pleader may be guided by the same theory, however unlike the result may be in external form; for the unlikeness exists in the facts themselves, and not in the manner of alleging them. It is possible, therefore, that this feature of unity should exist; that in all actions, whatever be the nature of the primary right and whatever remedy be demanded, the causes of action on one hand and the defences on the other may be stated according to one common principle. That this unity was contemplated by the legislatures which adopted the new system is very plain, because the language of the statute admits of but one meaning and is peremptory: that the spirit as well as the letter even have often been disregarded by the judges in the actual interpretation which they have given is equally plain. I pass this most important subject with no more present discussion, but shall return to it in a future chapter.

§ 59. (3) The third feature of unity or identity of method would be an absolute sameness in the manner of conducting the trial, whatever be the nature or object of the action, whatever be the primary right invaded, or the remedy sought to be obtained. This general sameness in the trial, if carried to the highest degree, would necessarily embrace the following subordinate particulars: namely, that the trial should be held in the one court or class of courts having jurisdiction to award all species of remedies; that the facts should be brought before the tribunal in the same manner, or, in other words, the mode of introducing the evidence

should be the same, either by oral testimony or by depositions, and the same rules should govern its admissibility; that the decision of the issues, whether of fact or of law, should be made by the same tribunal, announced in the same manner, and have the same effect. An identity in modes of trial plainly includes the foregoing special features, and beyond a doubt such an identity is in the nature of things possible. It is not only practicable, but it is the most natural and logical order of administration that all judicial controversies should be tried by a single court or class of courts, and that the witnesses should be examined and the evidence introduced in pursuance of one common mode. This has been done in New York since 1848, with respect to the common-law and the equity tribunals, and in the other States which have adopted the American system; and England has even gone much farther, and has provided for the consolidation of all the higher tribunals—those which had special jurisdiction as well as those which had general—into one Supreme Court for the transaction of every species of judicial business, and has provided that one form of proceeding, one action, shall be used in all controversies and processes for obtaining remedies, whether legal, equitable, in admiralty, in bankruptcy, probate, or divorce. It is also practicable, in the nature of things, that all issues, either of law or of fact, in every kind of action, legal or equitable, should be decided by the same tribunal in the same form and with the same effect. This tribunal, however, could not be the jury. There are controversies utterly beyond its competency. By abolishing the jury trial in civil causes, and by constituting all courts upon the model of the Court of Chancery, with one or more judges to determine all the matters in dispute, the theoretic identity in the mode of trial would be readily attained. While this unity is thus possible, it is only possible by abandoning an institution which may be regarded as an essential element of Saxon civilization. As long as the jury trial lasts in civil causes, as long as actions based upon the violation of certain primary rights and seeking certain remedies, must be decided by a dual court consisting of judge and jury, while all other actions must or may be decided by a court consisting of a judge only, an absolute identity in the mode of trial is plainly impracticable; and this difference is so important, so vital, that it extends through the whole framework of actions, and separates them into two distinctive classes,

notwithstanding the positive and sweeping language of the statute, which purports to abolish all distinctions and forms, and to prescribe one uniform mode or instrument for the procurement of all remedies. The jury trial, which in most of the States is guarded against hostile legislation by the restraints of the constitutions, is, therefore, a physical obstacle in the way of a perfect theory of unity in legal and equitable methods, and will continue to be so until the people cease to believe in the formulas of words that have been repeated from generation to generation as arguments in support of the institution.

§ 60. (4) A fourth feature of identity in external methods would be the adoption of the same rules as to parties and their application to all actions, whatever be the rights which they redress or the remedies which they pursue. This particular element of a comprehensive unity is certainly possible; but it would require a complete change in certain legal notions as to rights and liabilities which are as old as the common law itself. To illustrate: the common law does not consider it possible for two or more persons to be united as plaintiffs in the same action upon a contract, unless they are all for the purposes of that action equally united in interest, unless the benefit of the contract belongs to them as a unit, and unless the right in them was created at the same time and by the same act. When they are thus united, "jointly interested," the law requires that all of them be made plaintiffs. On the other hand, the law does not admit the possibility of two or more persons being proceeded against as defendants in one action upon contract, unless each is liable for the whole claim, unless this liability rests upon them all as a legal unit, and unless it was created at the same time by one and the same act or instrument. The common law knows nothing of defendants against whom a judgment for the entire amount of debt or damages is not to be rendered, nor of defendants who became liable at different times and upon separate instruments. The power to sue the makers and the indorsers of a note or bill in one action did not exist at the common law, but was created by statute. The rules of equity procedure are in every way different from these legal doctrines. Persons are constantly made defendants against whom a partial or perhaps no relief is asked or granted, and even defendants are not unfrequently entitled to relief as against each other, or as against the plaintiffs, or some of them.

The same is to a certain extent true of plaintiffs. In short, the legal notion of a necessary unity in the rights of the plaintiffs or in the liabilities of the defendants is unknown in equity. Persons are made parties because they have some perhaps remote interest in the controversy, and it is expedient to bind them by the decree. It is undoubtedly possible to extend these general principles as to parties, so that they may be applied to all actions, legal as well as equitable; but, as already stated, the technical notions above described of joint rights and liabilities must be abandoned, and the equitable conceptions must take their place. This revolution seems to have been accomplished in several of the Western States, whose legislation in this respect has gone much further than that of the New York code. A single example will be sufficient. When a thing in action, not being negotiable, is assigned, and the assignee brings an action upon it, he is required by the provisions of certain State codes to make the assignor a party defendant in order, in the language of the statute, "to answer to the assignment." No judgment is asked or granted against this additional defendant, and the whole proceeding is opposed to common-law notions, but is, nevertheless, eminently equitable, sensible, and just. In an action between the alleged assignee and the debtor alone, the assignor would not be in the least degree bound by the judgment; the debtor might, therefore, be exposed to a second suit brought by the assignor himself, and to a second recovery therein if the pretended assignment were disproved. The provision of the statute requiring the assignor to be made a party to the proceeding, so that he may contest the assignment, and be concluded by the decision, is admirable every way, and an easy adaptation of equitable doctrines to common-law actions.

§ 61. While this theoretic unity in respect to the parties is thus practicable and easy to be obtained if the bench and the bar would forget some technical rules of the common law which never had any foundation in the truth, yet the theory has not been fully carried out into practice in all the State codes. In New York, and in those States which have exactly copied its legislation, the ancient legal conceptions as to parties and joint rights and liabilities are not so expressly abolished as to produce the perfected result which, perhaps, the codifiers themselves designed. The experience of the Western States, to which reference has been made, demonstrates the

perfect ease with which the change can be made; and the equitable rules as to severance in the judgment, and among parties jointly interested, can be extended to all legal actions. In short, these ancient rules of the common law were supported by no reasons, either of principle or of expediency; the so-called arguments in their favor were, like so much of the old technical legal reasoning, a mere repetition of words having no basis of fact upon which to rest. Where a right is held by two or more, there is no *real* difficulty in the way of permitting one or some of them to sue; when a liability is imposed upon two or more, there is no *real* difficulty in the way of permitting one or some to be sued; and in either case the rights of all parties can be easily protected, so that the creditor shall in no instance receive but one satisfaction, or the debtor be compelled to pay the demand a second time.

§ 62. (5) It might appear that a fifth feature of the theoretical identity in judicial methods would be the reducing of all judgments to one single form, or to certain classes of forms, in all actions, whatever be the nature of the primary right or of the delict by which it is violated. There is, however, no such element of identity possible, nor is it involved in the theory of an absolute unification of legal and equitable modes of proceeding. The judgment is the official statement and award of the remedy which the law confers in the particular case. All judgments could not be assimilated and reduced to a single form, or even to a few clearly defined classes, without destroying the diversity in the remedies themselves, and reducing them to a single kind, or to the prescribed classes; and this, as we have seen, is not contemplated by any theory of reform in judicial methods. The various steps and processes leading up to the judgment may be made the same in all cases; but the judgments themselves, containing as they do the very final remedies which are the objects of all judicial controversies, must be as different in form and substance as the remedies themselves.

§ 63. If we pass, however, from this essential character and substance of the judgment to its incidentals, rules in relation to its mode of rendition may be adopted and applied to all actions, and thus all the identity of which the subject is capable may be produced. The rules which regulate the subjects of joint recovery and liability, and the severance in the recovery or lia-

bility among the parties, which prescribe the relations between the recovery and the existence of proper parties to the action, which define the instances in which affirmative relief may be granted to the defendants or to a portion of them, and those in which like relief may be obtained by plaintiffs against other plaintiffs, or by defendants against other defendants,—in short, all the rules which are concerned with the external form and manner of rendering the judgment and of giving it an official character and compulsive efficacy upon persons and things, can readily be made uniform in their application to all actions, whatever be the nature of the primary right or of the remedy conferred. The ancient doctrines of the common law which controlled the relations of judgments with the parties to the record, and which often prevented any determination of the actual rights and duties of the litigants as among themselves, were arbitrary and technical to the last degree ; they were sustained by no reasoning based upon the nature of the subject-matter, but were the results of a legal habit of mind which delighted in logical word-chopping, and preferred to rest the decision of judicial controversies upon refined distinctions in which there was nothing distinguished rather than upon considerations of substantial justice. In producing the uniformity of regulation which I have described, the principles and doctrines of equity must be substituted in place of the technical rules of the common law. That this change is practicable and easy has been demonstrated by the experience of those States which have carried out the theory of the reformed American system of procedure to its logical results. There can be no doubt that the framers of the New York code accepted this theory, in a general manner, as correct ; and I think they intended to construct their procedure in reference to parties and judgments upon it, to the exclusion of the common-law notions in respect to the same subjects from all classes of actions. How far they succeeded in expressing those general intentions by means of the particular provisions of the statute, and how far the courts have gone in developing the thought of the law-makers by their judicial construction, will be considered in subsequent chapters.

§ 64. I have in the foregoing analysis examined and stated the ideal of an absolute unity in judicial methods for the enforcement of civil rights and duties and the procuring of civil remedies ;

what such a theory involves ; what features or elements are possible, and what impossible. The conclusions thus reached may be summed up in the following propositions. The theory of an absolute union does not affect the primary civil rights and duties, nor the final remedies and the rights thereto ; it leaves the primary rights called legal and those called equitable, and the reliefs bestowed for their violation, substantially untouched. It is confined, therefore, to the judicial methods by which these remedies are to be obtained. An absolute unity in these methods, by means of a single form of civil action adapted to the enforcement of all civil rights and the recovery of all civil remedies, is theoretically possible. Such an absolute unity is, however, practically impossible so long as the jury trial is required in certain classes of causes, and is dispensed with in others, since that institution creates an essential difference in the manner of conducting actions, and in their very framework, which cannot be obliterated by any statutory declaration. In respect to all other features and elements of an action, — that is, except so far as the jury trial produces a modification, — the theoretical identity in all judicial proceedings is practicable, and may consist in the mode of commencing the action, in the method of stating the cause of action or the defence, in the manner of establishing the facts by evidence, in the rules relating to parties, and in those relating to the awarding of relief and the rendition of judgment. Having thus exhibited a complete theory or pure ideal of such a unity in methods as would remove all distinctions and create but one judicial instrument for the protection of all civil rights and the pursuit of all civil remedies, I shall next inquire how far this perfect theory has been worked out by the legislatures, and especially by the courts in their interpretation of the statutes which have established the reformed American system of procedure in the various States.

SECTION SECOND.

The General Principles as to a Union of Legal and Equitable Methods which have been adopted by the Courts ; how far such a Union has been practically effected by Judicial Interpretation of the Statutes.

§ 65. It is not my purpose in the present section to discuss in order the particular practical questions that have arisen in the

construction of those provisions of the State codes of procedure and practice acts which abolish the distinction between legal and equitable actions; namely, the combining of legal and equitable causes of action and defence in the same suit, the interposing of equitable defences to legal causes of action, the granting of legal remedies where the pleadings had contemplated equitable ones, or of equitable remedies where the pleadings had contemplated legal ones, and the like. I intend rather to ascertain, if possible, and state the general principles of construction which the courts have finally adopted and applied in the settlement of these and all other similar questions which have arisen from this most distinctive and important feature of the reformed procedure. These principles are fundamental; they underlie the whole process of judicial interpretation; they shape the entire action of the courts in building up a system of practical rules out of the broad and somewhat vague enactments of the statute. A knowledge of these controlling motives and opinions which have guided the judges in their work of construction is of the highest importance; with it we may attain a systematic and harmonious result; without it we shall certainly be left in a chaos of conflicting decisions. In pursuing this inquiry, I shall follow the order developed in the preceding section, and shall ascertain how far the interpretation given by the courts conforms to, and how far differs from, the theory of absolute unity therein set forth.

§ 66. The adoption of the Code of Procedure by the Legislature of New York in 1848 was undoubtedly a shock to the opinions and prejudices of lawyers who had been accustomed to regard the former system as perfect in principle; and, while it met with a strenuous opposition from many members of the bar, it is not surprising that some of the judges also for a time found it difficult, if not impossible, to yield obedience to the letter even of the statutory requirement, much less to accept its spirit with zealous approval. Opinions are to be found, delivered at an early day by very eminent and able judges, sometimes sitting in the court of last resort, which, if taken as correct expositions of the statute, would have reduced the great reform to the empty change in a few words; the ancient names would have been abolished, but all the substance, all that was represented by those names, would have remained in full force and effect. According to this view there had been no union of

methods into one common mode of proceeding, no abolition of any real distinctions between legal and equitable actions, because such a result is simply impossible of attainment.¹ Since the

¹ See *Reubens v. Joel*, 18 N. Y. 488, 498, and *Voorhis v. Child's Ex'ors*, 17 N. Y. 354, 367-362, per S. L. Selden J. As these opinions of Mr. Justice Selden furnish the clearest and ablest statement of the peculiar theory of interpretation mentioned in the text, I quote from them at some length. In *Reubens v. Joel*, he says, p. 493: "What are the distinctions between actions at law and suits in equity? The most marked distinction obviously consists in their different modes of relief. In the one, with a few isolated exceptions, relief is invariably administered, and can only be administered, in the form of a pecuniary compensation in damages for the injury received; in the other the court has a discretionary power to adapt the relief to the circumstances of the case. By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both; but it certainly is not possible to abolish the distinction between them. The legislature may, unless prohibited by the constitution, enact that no court shall hereafter have power to grant any relief except in the form of damages, and thereby abolish suits in equity, or that all courts shall have power to mould the relief to suit the particular case, and thereby virtually abolish actions at law as a distinct class. To illustrate by a single case: they may provide that when the vendor of land who has contracted to sell, and has received the purchase-money, refuses to convey, the vendee shall have no remedy but an action for damages, or, on the other hand, that he shall be confined to a suit for specific performance; but it is clearly beyond the reach of their powers to make these two remedies the same. Another leading distinction between common-law actions and suits in equity consists in their different modes of trial. The former are to be tried by a jury, the latter by the court. Can the legislature abolish this distinction? They might, but for the restraints of the constitution, abolish either kind of trial, or reclassify the classes to which they apply;

but they cannot make trial by jury and trial by the court the same thing. It is plain that the only way in which the declaration contained in § 69 can be made good, is by abolishing both the forms of trial and the mode of relief in one or the other of the two classes of actions. When this is done, and not until then, shall we have one homogeneous form of action for all cases. Has the legislature power to do this? [He here cites certain clauses of the New York Constitution recognizing the existence of equity.] Will it be contended, in the face of these provisions, that the legislature has the power to abolish the jurisdiction of the courts either at law or in equity? The constitution gives to the Supreme Court general jurisdiction both in law and in equity. Can this be taken away? It authorizes the legislature to "alter and regulate" both jurisdictions. Does this mean that it may abrogate them? It is, in my judgment, clear that the legislature has not the constitutional power to reduce all actions to one homogeneous form; because it could only be done by abolishing trial by jury, with its inseparable accompaniment, compensation in damages, which would not only conflict with the provisions that preserve trial by jury, but would in effect subvert all jurisdiction at law, as all actions would thereby be rendered equitable; or by abolishing trial by the court, with its appropriate incident, specific relief, which would destroy all equity jurisdiction, and convert every suit into an action at law." . . . p. 498. "But the legislature, in the specific provisions adopted by it, has not attempted to carry into effect the general declaration made in § 69." He cites §§ 258, 264, which require the jury trial in all actions in which it had heretofore been used, and provide a trial by the court for all other actions, and §§ 275, 276, which regulate the relief to be granted, and proceeds: "Instead of being abolished, the essential distinctions between actions at law and suits in equity are by these sections expressly retained. Actions at law are to be tried by a jury, suits in equity

New York Constitution provides that the Supreme Court of that State shall have general jurisdiction in law and equity, and speaks in one or two other places of "equity," it has been said from the bench that a statute abolishing the distinctive features of equity would be unconstitutional, and that the New York code, so far as it purports to produce that effect, is void.¹ The system which this school of judges has constructed out of the reformatory legislation is the following.² The distinctions be-

by the court. Damages are to be given as heretofore in the former, and specific relief in the latter."

¹ Selden J., in *Reubens v. Joel*, 13 N. Y. 494, 496.

² Selden J., in *Reubens v. Joel* and *Voorhis v. Child's Ex'ors*, *ubi sup.* The latter case was an action against the surviving members of a partnership and the executors of a deceased member to recover the amount of a promissory note made by the firm. The complaint was in the usual form; it contained no allegation that the survivors were insolvent or that judgment had been recovered against them, and prayed the usual judgment for the amount of the debt. On demurrer by the executors, on the ground that no cause of action was stated against them, the complaint was dismissed, and the plaintiff appealed. The Court of Appeals placed their decision upon the ground that an equity action could not be maintained against the personal representatives of a deceased partner to recover a firm debt without averring and proving that the survivors had been proceeded against at law to execution, or that they were insolvent, and that this rule had not been changed by the code. Mr. Justice Selden, while agreeing with this position, went far beyond it. The plaintiff insisted that the action was legal against the survivors, and that the executors were proper parties defendant under § 118, which provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." The learned judge answers that although the language of this section is broad enough to cover both legal and equitable actions, yet it is a mere stat-

utory enactment of the rule which had always prevailed in equity, and must, from the nature of the actions, of the tribunals which pass upon the issues, and of the judgments rendered, be confined to suits in equity, leaving actions at law to be governed by the same rules in respect of parties which prevailed before the code. He says (p. 858): "It is supposed by some that it was intended to abolish by the code all distinctions, not only in form, but in substance, between legal and equitable actions; and it must be conceded that many of its provisions taken by themselves might seem to indicate such an intent; and yet nothing can be clearer than that the legislature has wholly failed to carry into effect such an intention if it existed. On the contrary, the code expressly retains the principal differences which distinguish the two classes of actions. Actions at law were to be tried by a jury, suits in equity by the court. This distinction remains undisturbed. . . . Now it is plain that, if we would make of the code a consistent system, we must construe it, not in view of the general proposition, obviously untrue, that the distinctions between actions at law and suits in equity are abolished, but in the light afforded by a comparison of its various provisions." He proceeds to point out the practical difficulties in the way of applying the equitable doctrine as to parties to all common-law actions, and reaches the conclusion that, as the code recognizes equity suits and legal actions, the provisions of § 118 must be limited to suits in equity, and adds (p. 861): "It is worthy of remark that the construction here contended for is that which has been of necessity to a very great extent practically put upon the various provisions of the code. Cases are found so naturally

tween law and equity inhere in the very nature of the subject, and cannot be abolished. The legislature may, unless restrained by the constitution, abrogate the law or equity, but cannot destroy the distinctions between them. The language of the statute, however, is not broad enough to effect such a change; it is confined to external acts and forms, to the methods of obtaining remedies, to the incidents of actions, and not to their substance. Even when thus restrained, there are necessary elements in the subject-matter which cannot be affected by legislation, and which limit therefore the general phrases of the code. Assuming that primary legal and equitable rights and duties remain unaltered, essential differences must exist in the actions brought to enforce the legal and the equitable classes of rights, and also the various species of legal rights. For this reason the substantial features and characteristics of the various actions at law must and do subsist, and the rules which are based upon these facts must and do continue in operation. The names "covenant," "debt," "trespass," "assumpsit," "bill in equity," and the like, have been abandoned; but all the things which these names represented are left in their essentials exactly as before the attempted reforms. This theory of interpretation reduces the Code of Procedure from its position as the embodiment of a new system for the administration of justice to the level of a mere amendatory act regulating the minor details of practice. The explanation here made of it is now useful only as a matter of history; it never became controlling; the opinions which it represents were those of individual judges rather than of courts, and they have been repeatedly and completely overruled by tribunals of the highest authority.¹

to arrange themselves according to the classification which existed prior to the code that the distinction between legal and equitable actions is nearly as marked upon all the papers presented to the court as formerly. The same names are not used, but the nature of the cases has not changed, nor have the distinctions been abrogated. Very few attempts have been made to carry into practical effect the idea of blending legal and equitable causes of action in one common proceeding. Were it necessary to the decision of this case, I should be prepared to hold that that clause of the constitution which provides that 'there shall be a Supreme Court

having general jurisdiction in law and equity' presents an insuperable barrier to any legislative merger of the jurisdictions." In accordance with this theory, the same learned judge in various other cases held that the legal and equitable actions are still to be distinguished in their modes of pleading, in the rules as to parties, and in those respecting the rendition of judgment. In short, he would preserve all the *substance* of the two classes, and only give up the *names*.

¹ See the comments upon Mr. Justice Selden's opinion in *Reubens v. Joel*, made by Comstock J., in *N. Y. Ice Co. v. Northwest Ins. Co.*, 28 N. Y. 859, 860.

§ 67. This protest against the changes in the time-honored modes of judicial procedure, this antagonism to the principle of the new system, which was at the outset confined to a small though very able portion of the bench, was long since abandoned; and the courts have in most of the States not only conformed to the letter of the reformatory legislation, but have to a considerable extent, but not, as I think, to the full extent, accepted and carried out its evident spirit and meaning. I speak advisedly in this statement. While the courts *on the whole*, and in all the States, do not show a disposition to defeat the reform by a hostile construction, but rather seem desirous of promoting it, and establishing it upon a secure basis, there are yet marked differences in this respect among the States, and also strange inconsistencies in the application of general principles to particular instances. The acceptance of the reformed procedure is much more constrained and reluctant in certain of the States than in the remaining and by far the larger portion of them. Again, a lack of uniformity will be discovered in applying the most general and comprehensive principles of interpretation to the various elements and features of judicial procedure. All these inconsistencies, when they exist, have arisen from the incapacity of the judicial mind to apprehend the fact that legal actions and equitable actions have been abolished, and a "civil action" has been substituted in their place. Conceding this truth in general, courts have sometimes failed to act upon it in reference to some subordinate particulars; the result has been, not a perfect harmonious structure built up by judicial labor, but a structure, although following on the whole a comprehensive and symmetrical plan, yet marred by many breaks and unfinished parts, and misshapen additions. In short, the true fundamental principles of construction have been generally adopted as guides, the true spirit and design of the reformed system have been generally apprehended; but in descending to the details, and in prescribing the practical rules of procedure, this principle and this spirit have been sometimes forgotten or intentionally disregarded.

§ 68. It has been abundantly settled, in perfect accordance with the theory developed in the preceding section, and in strict conformity with the language and design of all the State codes and practice acts, that the new system has not produced, and was not intended to produce, any alteration of nor direct effect upon the primary rights, duties, and liabilities of persons created

by either department of the municipal law.¹ Whatever may have been the nature or extent of these primary rights and duties,

¹ *Peck v. Newton*, 46 Barb. 178, 174, per Parker J.; *Cole v. Reynolds*, 18 N. Y. 74, 76, per Harris J.; *Lattin v. McCarty*, 41 N. Y. 107, 110, per Hunt C. J.; *Meyers v. Field*, 37 Mo. 434, 441, per Holmes J.; *Richardson v. Means*, 22 Mo. 495, 498, per Leonard J.; *Maguire v. Vice*, 20 Mo. 429; *Matlock v. Todd*, 25 Ind. 128, 130, per Elliott J.; *Woodford v. Leavenworth*, 14 Ind. 311, 314, per Worden J.; *Emmons v. Kiger*, 23 Ind. 483, 487; *DeWitt v. Hayes*, 2 Cal. 463, 468, per Murray C. J.; *Grain v. Aldrich*, 88 Cal. 514; *Cropsey v. Sweeney*, 27 Barb. 310; *Klonne v. Bradstreet*, 7 Ohio St. 322, 325, per Bowen J.; *Garrett v. Gault*, 13 B. Mon. 378, 380, per Hise J.; *Bonesteel v. Bonesteel*, 28 Wisc. 245, 250, per Lyon J.; *Dickson v. Cole*, 34 Wisc. 621, 625; *Martin v. Mobile & O. R. R.*, 7 Bush, 116, 124; *Richmond, &c. T. Co. v. Rogers*, 7 Bush, 532, 535; *Lawson v. Plaff*, 1 Handy, 449, 452; *Claussen v. La Franz*, 4 Greene (La.), 224; *Smith v. Rowe*, 4 Cal. 6. As the very language used by the judges in certain of these cases will illustrate better than any description the exact views of the judiciary in regard to this fundamental principle, and especially the extent to which it has been applied in the controversies before them, I shall quote from it at some length. *Peck v. Newton*, 46 Barb. 178, was an action to recover possession of land, the plaintiff's title being equitable, substantially that of a vendee, and the defendant being an intruder without title so far as the case discloses; the complaint simply demanded possession. The court held that the plaintiff could not recover; that he should have obtained a specific performance from his vendor, and then brought an action for the possession. Parker J. said (p. 174): "Although the code has abolished the distinctions between actions at law and suits in equity, so far as it regards the forms of procedure, still the principles by which the rights of the parties are to be determined remain unchanged." Whether the court properly applied the principle which they invoke may well, as I think, be questioned. Does not the plaintiff's ability to recover the

possession in this action depend upon the "forms of procedure" rather than upon "the principles by which the rights of the parties are to be determined"? This particular question will be examined at large in section five of the present chapter. In *Cole v. Reynolds*, 18 N. Y. 74, Mr. Justice Harris thus states the doctrine (p. 76): "The principles by which the rights of the parties are to be determined remain unchanged. The code has given no new causes of action. In some cases parties are allowed to maintain an action who could not have maintained it before; but in no case can such an action be maintained when no action at all could have been maintained before upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts in an action prosecuted in the manner prescribed by the code will now entitle him to a judgment to the same effect. If the facts are such that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the code requires, obtain the same judgment. The question, therefore, is, whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the code, have sustained an action at law or a suit in equity." The leading case of *Lattin v. McCarty*, 41 N. Y. 107 (1869), is very decisive, both from the manner in which the questions arose, from the allegations of the pleadings, and from the language of the opinion delivered by Hunt C. J., and concurred in by the entire court. It, of course, overrules all prior decisions in that State which were opposed to it in their letter or in their spirit, destroys the effect of numerous judicial *dicta* scattered through the reports, and settles the law for New York. The complaint sets out facts showing an equitable ownership of land in the plaintiff, and a legal title in the defendant by means of a deed from the admitted source of title, regular in form, but alleged to have been fraudulent in fact; and it prayed possession of the

from whatever causes, facts, acts, or omissions they took their rise, whether they were denominated legal or equitable, they

land, cancellation of said deed, and a conveyance from the defendant to the plaintiff. A demurrer to the complaint, on the ground that two causes of action had been improperly united, having been sustained, the plaintiff appealed. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment below, from which I take the following extract (p. 109): "Assuming that the complaint does contain two causes of action as is insisted, the judgment was still erroneous. The argument principally relied upon to sustain the demurrer is this, that the two causes of action are of different characters, — one an action of ejectment, being an action at law, the other an action to set aside a deed as fraudulent, and of an equitable nature; that the latter may be tried by the court, while, in the former, the party is entitled to have his case passed upon by a jury. The codifiers labored assiduously to anticipate and to overrule this objection." He cites the preface of the code, and §§ 69, 167, and proceeds: "In these provisions, and in others, the distinction between legal and equitable causes of action is recognized. There is no attempt to abolish this distinction, which would be quite unavailing. The attempt is to abolish the distinction between the forms of action and the modes of proceeding in the several cases. The difficulty under consideration has also been expressly overruled by this court in the cases that I shall presently cite." And he cites several decisions which I shall refer to hereafter. In *Meyers v. Field*, 87 Mo. 484, 441, Mr. Justice Holmes said: "The distinction between law and equity has not been abolished by the new code of practice. Equitable rights are still to be determined according to the doctrines of equity jurisprudence, and in the peculiar modes of proceeding which are sometimes required in such cases; and legal rights are to be ascertained and adjudged upon the principles of law; and the rules of proceeding at law are in many respects very different from those which are applicable to equity cases." It should be remarked that much which Mr. Justice

Holmes says must be taken with great caution. His position in regard to the reformed procedure was quite similar to that occupied by Mr. Justice S. L. Selden. He refused to see in the new system any substantial change; and, although he seems to have led the court of Missouri to approve and adopt his peculiar views, that tribunal has since, as will be seen in subsequent sections, utterly repudiated them. In *Richardson v. Means*, 22 Mo. 498, the rule was thus stated by Leonard J.: "The code has not changed the rights of parties, but only provided new remedies for their enforcement. It has not abolished the distinction between legal and equitable rights, but the distinction between legal and equitable remedies, so far at least as to provide that one form of suit shall be used for the enforcement of both classes of rights." It is plain that the judge uses the word "remedies" here as synonymous with the instruments, the actions themselves, and not the reliefs procured thereby. In *Matlock v. Todd*, 25 Ind. 128, the defendant had invoked the statute of six years' limitation, which would bar an action at law; but the court held that the equitable rule applied, saying, "Though the code has abolished the distinction between actions at law and suits in equity and the forms of pleading, it has not changed the rules of law as to the rights of parties." In *Woodford v. Leavenworth*, 14 Ind. 811, 814, Worden J., said: "It is undoubtedly true that if, by the rules either of law or of equity, the plaintiff is entitled to recover on the facts stated, he may do so in this case. But the abolition of the distinction between actions at law and suits in equity does not entitle a party to recover in a case where before such abolition he could not have recovered either in law or in equity."

The courts of California have, from the very adoption of the new system by the legislature of that State, accepted and administered its provisions and principles according to their spirit and true intent; and I know of no decided cases from which the profession can obtain more aid in construing the reformatory legislation

remain exactly the same as before. The codes do not assume to abolish the distinctions between "law" and "equity," regarded as two complementary departments of the municipal law; not a clause is to be found which suggests such a revolution in the essential nature of the jurisprudence which we have inherited from England. The principles by which the courts determine the primary rights and duties of litigant parties remain unaltered; upon the acts or omissions which were the occasion of a right called equitable the same right is still based, and is still properly termed equitable; from the acts or omissions which were the occasions of a right called legal the same right still arises, and is still with propriety termed legal. I remark, in passing, that much of the confusion and uncertainty which now exist would at once disappear, if the bar and the bench should adopt a nomenclature in conformity with the settled principle of interpretation, and should speak of legal and equitable rights, legal and equitable remedies, but not of legal and equitable actions. To term an action "legal" or "equitable" is a misnomer, and one which involves a wrong conception and a false doctrine, since the statute has removed all distinction between legal and equitable actions, and has substituted in place of both a single "civil action;" and the courts have decided that the legislature intended exactly what it has said. But as the legisla-

as a whole, than many which are to be found in the series of California Reports. In one of the earliest of these, *De Witt v. Hayes*, 2 Cal. 463, which was an action to restrain the collection of a local tax or assessment, Murray C. J. stated the doctrine in so clear and correct a manner that I shall quote from his judgment at some length (p. 468): "The legislature, in providing that there shall be but one form of civil action, cannot be supposed to have intended at one stroke to abolish all distinction between law and equity as to actions. Such a construction would lead to infinite perplexities and endless difficulties. . . . So cases legal and equitable have not been consolidated; and though there is no difference in the form of a bill in equity and a common-law declaration under our system, where all relief is sought in the same way from the same tribunal, the distinction between law and equity is as naked and broad as ever. To

entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate or complete relief at law." In *Bonesteel v. Bonesteel*, 28 Wisc. 245, 250, Lyon J. said: "There are certain essential and inherent distinctions between actions at law and in equity, to abolish which is beyond the power of legislative enactment. The legislature may abolish the old forms of action, and has done so; but the essential principles of equitable actions and equitable relief, as distinguished from legal actions and remedies, are as vital now, and as clearly marked and defined, as before the enactment of the code. They are indestructible elements in our system of jurisprudence, and the courts are constantly required to recognize and apply them." See *Mowry v. Hill*, 11 Wisc. 146, 149.

ture did not say, nor mean to say, that the distinctions between legal and equitable rights or remedies are abolished, those terms may be used with propriety and correctness. The reformed American system, in short, has given no new causes of action. Primary rights and duties are unchanged; the delicts or wrongs which are the violations of these rights and duties are still committed in the same manner as before; and as these primary rights and duties, and the wrongs which violate them, constitute the causes of action over which the courts exercise their remedial jurisdiction, it is plain that no statute relating solely to procedure can increase, diminish, or modify the causes of action which exist independently of procedure. In some instances particular parties are permitted to maintain an action who could not have maintained it under the old practice; but in no instance can this now be done, where upon the same facts and circumstances a similar action could not have been maintained by some person. A familiar illustration of this statement is found in the change made in the common-law rule prohibiting an action by the assignee of a non-negotiable thing in action, and requiring the suit to be prosecuted in the name of the assignor, although for the benefit, and, as it was finally settled, under the complete control of the assignee. The codes have abrogated this technical dogma, and thus permit an action to be brought by a party who formerly had no such power; but this does not create nor constitute any new cause of action. The assignee now sues where the assignor sued; the same facts must be proved, the same rights asserted, and the same relief given; the only change is in permitting the assignee to accomplish directly, and in his own name, what he before accomplished indirectly and by the use of another's name.

§ 69. The doctrine thus uniformly established in reference to the effect of the reform legislation upon primary rights and duties, and causes of action, is also as clearly settled in reference to its effect upon remedies and remedial rights, when the term is used—as it properly should be—to denote the reliefs which are conferred upon parties, and not the means of procuring these reliefs. The word “remedies” is sometimes used in two different technical senses, and from this dual meaning there arises—as in all such cases—doubt and confusion. The secondary and in strictness improper signification renders the word equivalent to the

mere judicial instruments and their incidents, the actions at law, suits in equity, special proceedings, and the like,—the various steps in a forensic controversy which fall within the proper domain of practice. The primary and strictly accurate signification makes it synonymous with the judgments which are pronounced by the court, and which establish the remedial rights and prescribe the manner in which and the means by which they are to be satisfied. Or “remedies” may denote those judgments executed and performed by which the party has received the very benefit to which he was entitled,—the sum of money, the possession of the land or of the chattels, the execution and delivery of the deed, the cancellation of the agreement, the removal of the obstruction, or whatever else was ordered to be done by the opposite party. In either of these two latter senses, the remedies which were in use under the former system, and which were awarded by the courts upon proper occasions, are absolutely unaffected in any of their essential features by the reformatory legislation.¹ The general and sweeping language so often

¹ See cases last cited under § 68; also, *Carrico v. Tomlinson*, 17 Mo. 499; *Butler v. Lee*, 38 How. Pr. R. 251 (Ct. of App.). The report of the latter requires a correction. The first paragraph of the head-note is not sustained by any *decision* of the court in the case. A decision had been made by the court below in July, entered and certified by the clerk in August, and incorporated into the judgment roll in November. It became important to determine at which of these times the decision below became the judgment of the court. Mr. Justice Morgan regarded the solution of this difficulty as depending upon the question whether the action was legal or equitable in its nature, and with that view proceeded to examine the former practice at law and in chancery as to the entry of judgments. In the course of his opinion he made the following remark, which the reporter has raised to the dignity of the head-note, as though it was one of the necessary points decided by the court: “I am aware that this confusion in the use of language is in part at least to be ascribed to the code of procedure which attempts to abolish the distinction between proceedings at law and in equity, whereas it is evident from the very nature

of the case that judgments at law and in equity cannot be assimilated.” This is doubtless true when the essential nature of the judgment—that is, what it directs to be done or not to be done—is referred to; but if the reference is merely to the incidents, the mode of entry, the official acts to be done by the clerk, and the like, it is not true; there is absolutely nothing in the way of making the rules as to such matters the same for all kinds and sorts of judgments. But the code makes no attempt to produce any “assimilation” in the essential nature of different classes of judgments, does not even suggest such a result. Mr. Justice Morgan is also careless in his citation of the language used by the legislature. The code does not “attempt to abolish the distinction between *proceedings* at law and in equity.” It abolishes the distinction between *actions* at law and *suits* in equity. The word “proceedings” is much broader than either action or suit; and, as has been shown, the removal of all distinction between these latter does not in terms nor in spirit purport to remove the distinctions which may subsist between the judgments that are the results of the action or suit.

quoted abolishes the distinction between actions at law and suits in equity; and other provisions and clauses recognize all the forms of judgment known to the common-law courts, namely, for payment of money, for the possession of land and of chattels, and also the specific kinds of relief which courts of equity embodied in their decrees. Strictly speaking, the remedy given is no part of the action, but is the result thereof; it is the object for which the action is prosecuted, the end at which all the litigation is directed. A modification of the action, a change in its forms, incidents, names, modes of procedure, including the process, the pleadings, the parties, the manner of trial, and all other steps preparatory to the judgment, does not involve any alteration in this result; the general language of the codes does not, therefore, include and apply to the substance of the judgments, that is, of the remedies. Without, however, relying exclusively upon an interpretation which may seem to be too refined and verbal, the practical construction given by the courts, and as illustrated by the citations contained in the preceding foot-note, fully sustains the conclusions which are reached by an analysis of the language. Abolition of the distinction between legal and equitable actions, and of the forms of legal actions, does not abolish the distinctions between remedies. If from the nature of the primary right, and of the wrong by which it is invaded, the injured party would under the old system have been entitled to an equitable remedy, he is still entitled to the same relief, and it may well be termed equitable; if from the like causes he would have been entitled to a legal remedy, he is still entitled to the same relief, and it may properly be described as legal.

§ 70. It having been thus determined that no effect has been wrought upon the primary rights and duties which constitute the great body of the municipal law, nor upon the final remedies granted to the litigant parties, the courts have, with general though not with absolute unanimity, agreed upon the interpretation to be given to the provision under consideration. The broad principle of construction may be regarded as established in most if not all the States, that the clauses of the statutes abolishing the distinction between actions at law and suits in equity were intended to mean exactly what they say, without reservation or equivocation. All the differences which belonged to the external machinery by which a judicial controversy was

conducted up to the judgment itself, all the rules respecting forms of action, all the peculiar characteristics of a legal or of an equitable action, or of the various kinds of legal actions, except the constitutional requirement as to the jury trial, have been swept away. One action, governed in all instances by the same principles as to form and methods, suffices for the maintaining of all classes of primary rights, and for the pursuit of all kinds of civil remedies.¹ I say, governed by the same *principles*

¹ *Dobson v. Pearce*, 12 N. Y. 156, 165; *Crary v. Goodman*, 12 N. Y. 266, 268; *N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co.*, 14 N. Y. 85, 90; *Cole v. Reynolds*, 18 N. Y. 74, 76; *Bidwell v. Astor Ins. Co.*, 16 N. Y. 263, 267; *Phillips v. Gorham*, 17 N. Y. 270, 273, 275; *Laub v. Buckmiller*, 17 N. Y. 620, 626; *N. Y. Ice Co. v. Northwest Ins. Co.*, 28 N. Y. 857, 869; *Brown v. Brown*, 4 Robt. 688, 701; *Grinnell v. Buchanan*, 1 Daly, 538; *Crosier v. McLaughlin*, 1 Nevada, 348; *Rogers v. Pen-nistion*, 16 Mo. 432; *Troost v. Davis*, 31 Ind. 34, 39; *Scott v. Crawford*, 12 Ind. 411; *Kramer v. Rebman*, 9 Iowa, 114; *De Witt v. Hayes*, 2 Cal. 463; *Wiggins v. McDonald*, 18 Cal. 126; *Bowen v. Aubrey*, 22 Cal. 566, 569; *Ireland v. Nichols*, 1 Sweeney, 206; *Garret v. Gault*, 13 B. Mon. 378, 380; *Wright v. Wright*, 54 N. Y. 437, 442; *White v. Lyons*, 42 Cal. 279; *Giles v. Lyon*, 4 N. Y. 600; *Getty v. Hudson River R. R.*, 6 How. Pr. 269; *Mowry v. Hill*, 11 Wisc. 146, 149. To obtain any clear and correct notions of the general principle stated in the text, the facts and circumstances to which it has been applied from time to time must be exhibited, and the language used by the judges in making such application must be quoted at some length. In *Dobson v. Pearce*, 12 N. Y. 156, 165, which is a leading and important case, Allen J., said: "Under our present judiciary system the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished; and the defendant may now set forth by answer as many defences as he may have, whether they be such as have heretofore been denominated legal or equitable or both. . . . The

intent of the legislature is very clear that all controversies respecting the subject-matter of the litigation should be determined in one action; and the provisions are adapted to give effect to that intent." Johnson J., said in the same case (p. 168): "The code having abolished the distinctive actions at law and suits in equity, and the forms of all such actions as heretofore existing, an equitable defence to a civil action is now as available as a legal defence. The question is, Ought the plaintiff to recover? and any thing which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance." In *Crary v. Goodman*, 12 N. Y. 266, 268, the doctrine was stated by Johnson J., as follows: "Since the enactment of the code the question is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence against the plaintiff's claim, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for." The *N. Y. Ins. Co. v. The Nat. Protec. Ins. Co.*, 14 N. Y. 85, was brought to reform a policy of insurance and to recover the amount due after reformed. Denio J., said (p. 90): "As the courts of the State are now constituted, they apply legal and equitable rules and maxims indiscriminately in every case. In a suit which could not formerly have been defended at law, but as to which the defendant could have been relieved in equity, he can now have the like relief in the first action. And such relief consists in denying the plaintiff the right to recover. It was always theoretically unreasonable that in one branch of the judi-

as to form and method; but this does not assume that exactly the same form or method is to be or can be used in all actions

ciary the court should hold that the party prosecuted had no defence, while in another branch the judges should decide that the plaintiff had no right to recover. The authors of the code, aiming at greater theoretical perfection, have abolished this anomaly; and now, when an action is prosecuted, we inquire whether, taking into consideration all the principles of law and equity bearing on the case, the plaintiff ought to recover." In *Cole v. Reynolds*, 18 N. Y. 74, 76, Mr. Justice Harris used this language: "By the code the distinction between actions at law and suits in equity is abolished. The course of proceeding in both classes of causes is now the same. Whether the action depend upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction." In *Brown v. Brown*, 4 Robt. 688, 701, Mr. C. J. Robertson states the doctrine in a very accurate and comprehensive manner as follows: "But all the boundaries of jurisdiction and distinctions between causes of action as legal or equitable being removed, there seems no reason why all the relief to which the plaintiff is entitled should not be given in one action. . . . Now, however, the only ordinary proceeding in a court to enforce or protect a right or prevent a wrong is in the most general terms an action. It can have but one form. Every distinction between actions at law and suits in equity, and their forms, is abolished. Every court, therefore, whether exercising legal or equitable jurisdiction in such proceedings, now possesses the former powers of both courts of law and equity to investigate disputed questions by every mode peculiar to either, and to make its judgment as to the rights of the parties effectual." Language used by Ch. J. Daly in *Grinnell v. Buchanan*, 1 Daly, 688, is equally clear and accurate: "The distinction between legal and equitable tribunals, between actions at law and suits in equity, has been abolished; and we have but one form of procedure, whether the relief sought be legal or equitable or both. . . . Where a choice is to be made

between the form of proceedings at law or in equity, that one is to be preferred which is the most direct, consistent, and comprehensive; and in this respect the rule which prevails in courts of equity is a less technical and a better one than that which exists in courts of law." The rule spoken of was that permitting assignees of things in action to sue in their own names. The same general doctrine has been fully adopted by the courts of other States. In *Troost v. Davis*, 81 Ind. 34, 39, Ray J., said: "In our State, where the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished; and, where an equitable defence may be set up to a legal claim, it seems inconsistent to assert that, because a party is asserting a right under a legal form, equity will not give the same protection to equitable rights that they would receive if the proceeding was under equitable forms. All these distinctions in form, as well as actions and suits, are abolished; and equity can be invoked under all circumstances where an equitable right calls for protection or enforcement." And in California, in *Wiggins v. McDonald*, 18 Cal. 126, Cope J., says (p. 127): "We have but one form of action for the enforcement of private rights; and with certain exceptions the statute requires that the action shall be prosecuted in the name of the real party in interest. In the form of remedy no distinction exists between legal and equitable rights. In this respect the two classes of rights are placed precisely upon the same footing, and must undergo the same remedial process for their enforcement." The same court, in the much later case of *White v. Lyons*, 42 Cal. 279, 282, announces the doctrine by Mr. Justice Crockett in the following manner: "Under the code there is but one form of action in this State; and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If the facts stated are such as address themselves to the equity side of

for whatever purposes brought. The common principle as to form and method is not that all actions shall assume absolutely the same form, nor is it that they shall be governed by any technical rules which separate them into arbitrary classes; it is that they shall all conform to and follow the facts and circumstances which constitute the cause of action, and entitle the parties to relief. It is established, therefore, that a single judicial action, based upon and conforming to the facts and circumstances of each particular case, whatever be the nature of the primary

the court, the appropriate relief will be granted by the court sitting as a court of equity. On the other hand, if the facts alleged are purely cognizable in a court of law, the proper relief will be administered in that form of proceeding. But a complaint which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action. In this case the defendant does not question the sufficiency of the facts alleged to constitute a cause of action in a proceeding at law, but insists that this complaint is a bill in equity, and that a court of equity has no jurisdiction of the case. In that event the court will treat it as an action at law, and administer the proper relief in that form of proceeding." The same conclusions as the foregoing were reached by the Court of Appeals in the very recent case of *Wright v. Wright*, 54 N. Y. 437. The action was by a wife against a husband upon a promissory note given by him to her before the marriage, and in contemplation thereof. The complaint was in the usual form of an action on a note. Reynolds J., after showing that, under the statutes of New York, a wife may sue her husband, says (p. 442): "While it is admitted that the rights of the plaintiff could be enforced by a suit in equity, yet it is insisted that this, being an action at law, cannot be maintained by a married woman against her husband. It might be asked by what authority the defendant names this an action at law. What additional allegation in the complaint would have enabled the defendant to designate it as a suit in equity? Nothing more could be truly said, except that the consideration of the note was a prom-

ise to marry, which had been performed; and all this was proved without objection. While regard is still to be had in the application of legal and equitable principles, there is not of necessity any difference in the mere form of procedure, so far as the case to be stated in the complaint is concerned. All that is needful is to state the facts sufficient to show that the plaintiff is entitled to the relief demanded; and it is the duty of the court to afford the relief without stopping to speculate upon the name to be given to the action. These principles have been frequently acted upon by the court. Indeed, if some such result has not been attained by the code of procedure, we are still in the labyrinth of legal technicalities in practice and pleading, contrived long ago and tending to enslave the administration of justice, and from which it has been hoped we had, by legislative aid, secured comparative freedom. When, as in our system, a single court has jurisdiction both in law and in equity, and administers justice in a common form of procedure, the two jurisdictions of necessity became to some extent blended. This must be especially the result when the forms of pleading and proceeding are alike. . . . Certain forms are needful to be preserved; but they must not obstruct the path to exact justice; and, if they do, they will be swept away." I know of no opinion which more accurately and completely expresses the true intent and spirit of the reformed procedure than this. It contains the principle from which the entire system must be developed, if that system is to be a harmonious and symmetrical one.

right which they create, must be used for the pursuit of all remedies, legal or equitable.¹ The authorities referred to in the notes show that this doctrine is now adopted in all the States where the reformed procedure prevails, and that there is little variation in the language by which it is expressed. When, however, we shall pass from this statement of the doctrine in the abstract to the application of it in particular instances, — as, for example, in questions as to parties, pleading, judgments, — the perfect uniformity of judicial opinion and action disappears; but still in the great majority of the States the courts have fairly followed the true intent of the legislation and the correct principle of interpretation.

§ 71. Thus it may be regarded as a settled rule, resulting from the statutory provision in question, that if a plaintiff has set forth facts constituting a cause of action, and entitling him to *some* relief, either legal or equitable, his action shall not be dismissed because he has misconceived the nature of his remedial right, and has asked for a legal remedy when it should have been equitable, or for an equitable remedy when it should have been legal.² Nothing was a more familiar rule in the old system

¹ See cases cited in last preceding note.

² *Crary v. Goodman*, 12 N. Y. 266, 268; N. Y. Cent. Ins. Co. v. National Protec. Ins. Co., 14 N. Y. 85, 90; *Emery v. Pease*, 20 N. Y. 62, 64; *Bidwell v. Astor Ins. Co.*, 16 N. Y. 263, 267; *Phillips v. Gorham*, 17 N. Y. 270, 278, 275; *Laub v. Buckmiller*, 17 N. Y. 620, 626; N. Y. Ice Co. v. N. W. Ins. Co., 28 N. Y. 357, 359; *Barlow v. Scott*, 24 N. Y. 40, 45; *Marquat v. Marquat*, 12 N. Y. 336; *Troost v. Davis*, 81 Ind. 34, 39; *Grain v. Aldrich*, 88 Cal. 514, 520; *Leonard v. Rogan*, 20 Wisc. 540, 542. And see the various quotations in note to § 70, *ante*. In addition to several of the quotations last referred to, the following extracts will illustrate the statement of the text: In *Emery v. Pease*, 20 N. Y. 62, the complaint set out facts entitling the plaintiff to an accounting, but did not ask one; it did not aver any settlement, nor ascertained balance due, and demanded judgment for a sum certain. On the trial the complaint was dismissed, on the ground that it did not set forth facts sufficient to constitute a cause of action. Comstock J.,

after stating the old rule by which the action would have been properly dismissed, proceeds (p. 64): "In determining whether an action will lie, the courts are to have no regard to the old distinctions between legal and equitable remedies. Those distinctions are expressly abolished. A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled." *Bidwell v. Astor Ins. Co.*, 16 N. Y. 268, was an action on a policy of insurance. The complaint asked that the policy be reformed, and that the defendant pay \$7,000 as the sum insured by the reformed policy. Without a reformation the plaintiff was not entitled to a judgment for any amount. On the trial a mistake in the instrument was proved, and the court directed a judgment for \$7,000. The defendant insisted that a judgment for damages, instead of one for a reformation, was improper. The court

than the one which turned a plaintiff out of court if he had mis-conceived the nature or form of his action. If he brought an action at law, and on the trial proved a case for equitable relief, or if he filed a bill in equity, and at the hearing showed himself entitled to a judgment at law, he must absolutely fail in that proceeding. It is very plain that this arbitrary and most unjust rule rested wholly upon the ancient notions as to distinctions between legal and equitable actions, and did not rest upon any notions as to the primary rights which the litigant parties sought to maintain. Wherever, therefore, the letter and spirit of the reformed system are followed by the courts, this harsh rule is swept away. A suit does not now fail because the plaintiff has erred as to the form or kind or extent of the remedy he demands. A party cannot be sent out of court merely because the facts alleged do not entitle him to relief at law, or merely because they do not entitle him to relief in equity. If the case which he states shows him entitled to any relief, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment that is not embraced by the facts. The only inconvenience which a plaintiff can suffer from such an error is, that the trial may, perhaps, be suspended, and the cause sent

say: "There was nothing in the objection that the court should have stopped with reforming the policy, and turned the plaintiff over to a new action to recover damages." The *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357, is an important and suggestive case. The action was on an insurance policy. The plaintiff claimed a money judgment for a loss, and also a reformation of the policy which, if made, would entitle him to a further recovery of money. He failed to make out a case for a reformation; whereupon the trial court dismissed the action, holding that the other issue could not be tried. Comstock J., said (p. 359): "I am of opinion that it was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief granted, if there was enough left of his case to entitle him to recover the sum in which he was insured. No suggestion was made that the complaint did not show a good cause of action for this money, even after striking out all the allegations and the prayer

on the subject of the equitable relief." The same doctrine is again applied in *Barlow v. Scott*, 24 N. Y. 40, 45, Lott J., saying: "Under our present arrangement, the same court has both legal and equitable jurisdiction; and if the facts stated by a party in his complaint are sufficient to entitle him to any of the relief asked, and an answer is put in putting these facts in issue, it would be erroneous to dismiss the complaint on the trial merely because improper relief is primarily demanded." The true principle was tersely and most accurately stated by Sanderson J., in *Grain v. Aldrich*, 88 Cal. 514, 520: "Legal and equitable relief are administered in the same forum and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity."

to another branch of the court, or, as in Kentucky, Iowa, and Oregon, to another docket.¹ If a plaintiff had brought his action on the theory that it was based upon an equitable right, and sought an equitable relief, and it turns out to be in effect legal, so that the defendant is entitled to a jury trial, the trial must be had before a jury, and not before a single judge sitting as a chancellor; and, when the trial had taken place before the wrong tribunal, the judgment would be reversed, and the cause sent for a new trial in the proper place.²

§ 72. The rule discussed in the foregoing paragraph as to the relation between the facts alleged and the relief asked and granted was not established without a struggle, and has not at all times, and in all the States, prevailed without exception, and perhaps is not even now *universally* accepted. Many early cases in New York were decided under the influence of the former practice and the ancient notions; and, although the Court of Appeals has completely repudiated the doctrine of those adjudications, yet the principles announced by it have not always been followed by the inferior tribunals of the same State.³ In one or two of the States, and especially in Missouri, the ancient rules and doctrines in reference to this subject-matter have been repeatedly asserted, and, until a very recent period, prevailed in the courts, notwithstanding the adoption of the reformed procedure. In Missouri, the judiciary, standing alone in this respect, preserved for a long time the real distinctions between legal and equitable actions as strongly marked as under the former system, and, in fact, insisted upon a rule more strict than that enforced by the English Court of Chancery. The following examples will illustrate this peculiar interpretation of their code by the Missouri courts. In those cases where the plaintiff holds the equitable title to land, while the legal title is in the defendant by

¹ *McCrory v. Parks*, 18 Ohio St. 1; *Ellithorpe v. Buck*, 17 Ohio St. 72. See *Dickson v. Cole*, 84 Wisc. 621, 625.

² *Davis v. Morris*, 36 N. Y. 569, 571, 572, per Grover J. In this case the New York Court of Appeals laid down, in a formal manner, the rule as to the trial of legal and equitable issues. If the pleadings present both legal and equitable issues, the parties are entitled to a jury, and all the issues must be tried together; that is, there should not be a partial

trial before a jury and the residue before another tribunal. If, however, the plaintiff insists upon a trial before the court, and his claim is acceded to, upon the discovery that the action presents issues which must be decided by a jury, the complaint should not be dismissed, but the cause should be sent to the circuit for trial as a jury cause; *Parker v. Laney*, 58 N. Y. 469; *Richmond v. Dubuque*, &c. R. R., 83 Iowa, 422, 489-491.

³ See *Peck v. Newton*, 46 Barb. 178, 174.

means of a fraudulent conveyance, it has been frequently held that the former must first obtain a decree in equity, cancelling the outstanding deed, and must then resort to a separate action of ejectment to recover possession of the land. A vendee of land has also been required to proceed in two distinct actions,—the first equitable, to compel a specific performance, and the second legal, to obtain possession. The plaintiff was turned over to a second legal action in order to complete his remedy, because, as the court repeatedly insisted, possession of land can never be awarded by a decree in equity.¹ The Missouri court has recently receded, in part at least, from this extreme position, and is plainly tending towards a complete harmony with the doctrines which are accepted in other States.² A simple criterion has been suggested by which to determine the nature of the action. If the facts alleged in the complaint or petition would entitle the plaintiff to both legal and equitable relief, the prayer for judgment—that is, the nature of the remedy demanded—might be a certain test by which the character of the suit should be known.³ This suggestion has not, however, been followed in other cases.

§ 73. To recapitulate the results of the foregoing discussion: The courts have, with few exceptions, accepted the language of the code in its simplicity, and have given to it a reasonable meaning; they have acknowledged that the legislature intended to abolish, and has abolished, all the features which distinguish legal and equitable actions from each other, and has established a single action for the pursuit of all remedies; they have settled the doctrine that by the use of this single action neither the primary rights nor the remedial rights of litigant parties are affected or in any manner modified, since they do not depend upon matters connected with the form or external features of the action, and that among the matters which are thus connected with the form are the setting forth or statement of the cause of action or defence in the pleadings, and the demand of relief or prayer for judgment. A mistake or misconception in

¹ *Meyers v. Field*, 37 Mo. 434, 441; *Walker*, 25 Mo. 367; *Reed v. Robertson*, 45 Mo. 580; *Rutherford v. Williams*, 42 Mo. 18, 28; *Fithian v. Monks*, 48 Mo. 502, 517; *Magwire v. Tyler*, 47 Mo. 115, 127.
² *Henderson v. Dickey*, 50 Mo. 161, 165, per *Wagner J.*
³ *Gillett v. Treganza*, 18 Wisc. 472, 475, per *Dixon C. J.*

Maguire v. Vice, 20 Mo. 429; *Curd v. Lackland*, 43 Mo. 139; *Wynn v. Corry*, 43 Mo. 301; *Gray v. Payne*, 43 Mo. 203; *Bobb v. Woodward*, 42 Mo. 482, 487; *Peyton v. Rose*, 41 Mo. 257, 262; *Gott v. Powell*, 41 Mo. 416; *Moreau v. Detchemendy*, 41 Mo. 431; *Walker's Admr. v.*

respect to the action being called legal or equitable, does not defeat the plaintiff, but at most may require a trial before a properly constituted court. One fundamental principle controls the administration of justice by means of this common civil action, and this principle may be formulated in the following manner: The object of every action is to obtain a judgment of the court sustaining or protecting some primary right or enforcing some primary duty; every such primary right and duty results from the operation of the law upon certain facts, in the experience of the person holding the right or subjected to the duty; every wrong or violation of this primary right or duty consists in certain facts, either acts or omissions of the person committing the wrong. A statement, therefore, of the facts from which the primary right or duty arises, and also of the facts which constitute the wrong or violation of such primary right or duty, shows, and must of necessity show, at once a complete cause of action; that is, the court before which this statement is made can perceive from it the entire cause of action, the remedial right flowing therefrom, and the remedy or remedies which should be awarded to the injured party. All actions can be and should be constructed in the manner thus described; and if so they would conform to the single and common principle announced by the reformed method of procedure. Whether the rights and duties are legal or equitable, whether the remedies appropriate are legal or equitable, whether the facts are simple and few or complex and numerous, does not in the slightest degree affect the application and universality of this principle; it is the central conception of the new system, the corner-stone upon which the whole structure is erected.

§ 74. It is not my purpose in the present section to follow this general principle in its application to the various features and phases of an action; to do so would be to anticipate the matter contained in several subsequent chapters. A brief allusion must be made, however, to one of these topics, or else the theory of construction finally accepted by the courts will be but partially explained, — I refer to the subject of pleading. No single element of difference more sharply marked the contrast between the action at law and the suit in equity under the former system than the manner in which the litigant parties in each stated their causes of action and their defences. Although it

was said that in each kind of judicial proceeding the *facts* constituting the cause of action or defence should alone be alleged, this rule was not followed in actual practice. In a common-law action the "issuable facts" only were spread upon the record. The plaintiff never narrated the exact transaction between himself and the defendant from which the rights and duties of the parties arose; he stated *what he conceived to be the legal effect of these facts*. Thus, if the transaction was a simple arrangement respecting the sale and purchase of goods, instead of disclosing exactly what the parties had actually done, the pleader used certain formulas expressing the supposed legal effect of what had been done, as that he had "sold and delivered" or had "bargained and sold" the chattels; and, if a mistake was made in properly conceiving of this legal effect, — that is, if the real facts of the transaction, as disclosed by the evidence, did not correspond with this conception of their legal effect taken by the pleader, — the plaintiff might be, and, unless permitted to amend, would be, turned out of court. On the equity side the facts as they occurred, rather than the legal aspect of or conclusions from these facts, were set forth, according to the original theory of equitable pleading. In practice this narrative was always accompanied by a detail of mere evidentiary matter, which was inserted, not because it was necessary to the statement of the cause of action, but because it was a means of obtaining admissions from the defendant, and of thus making him a witness in the cause against himself. A bill in equity had, therefore, two entirely distinct uses and offices; it was a narrative of the facts from which the plaintiffs' rights to relief arose, and it was an instrument for obtaining evidence from the opposite party. This latter purpose, which was known as "discovery," the codes have expressly abolished, and have substituted in its stead the more direct method of an oral examination of one party by the other, if desired, either on the trial or preliminary thereto.

§ 75. Upon the adoption of the reformed system in New York there arose at once in that State, and subsequently in other commonwealths, two schools of interpretation in reference to the modes of pleading prescribed by the new procedure. One school maintained that all the distinctive features and elements of the common law and of the equity modes of pleading remained in

full force, and that the legislature had simply abolished certain names and certain technical rules of mere form. This particular theory was a necessary and evident corollary of the broader principle advocated by the same school, and already explained in the present section, that the division of actions into legal and equitable still existed, in all that pertained to their substantial nature; if actions were now, as before, legal or equitable, the most characteristic features of the two classes, that which marked their difference in the most emphatic manner,—the peculiar modes of pleading appropriate to each,—were of course preserved. In a common-law cause the pleader was to follow the common-law rules of pleading, and in an equity suit the equity rules. This doctrine was asserted and was sustained with great ability and earnestness by several judges in the infancy of the system. It would be useless to cite all the reported decisions in which it was advocated; and I shall only refer to a few which have always been regarded as leading.¹ The other school asserted that all the distinctions between the common-law and the equity modes of pleading had been embraced within the sweeping language of the statute, and had been discarded; that one general principle of pleading was applicable to the civil action in all cases, whatever might be the nature of the primary right it sought to maintain, or of the remedy it sought to procure. This principle, which was stated in a preceding paragraph, is simple, universal, and natural. It is merely that the pleader must narrate in a plain and concise manner the actual facts from which the rights and duties of the parties arise, and not his conception of their legal effect, nor, on the other hand, the mere detail of evidence which substantiates the existence of those facts. This comprehensive principle applies to all kinds of actions, to one founded upon a legal right and seeking a legal remedy, and to one founded on an equitable right and seeking an equitable remedy; and it avoids all questions and difficulties as to the “issuableness” of the matters

¹ *Rochester City Bank v. Suydam*, 5 How. Pr. 216; *Wooden v. Waffle*, 6 How. Pr. 145. I cite these, because they were pioneer cases, and in no others have the arguments in favor of the theory which they maintain been presented with greater fulness and more ability. That they are

special term decisions detracts from their authority; they are not, however, quoted as precedents, but simply as illustrations of the course of judicial action in the matter of interpreting the code of procedure.

alleged. Undoubtedly, from the very nature of the primary rights invaded and of the remedies demanded, the narrative of facts will generally be much more minute, detailed, and circumstantial in actions brought to maintain equitable rights and to recover equitable relief than in those based upon legal rights and pursuing legal relief, but this incident does not alter or affect the principle which governs all cases; the pleader in both cases sets out the facts which entitle him to the remedy asked, and no more; it simply happens that legal remedies usually depend upon a few positive facts, while equitable remedies often arise from a multitude of circumstances, events, and acts, neither of which, taken by itself, would have created any right or imposed any duty. It would be useless to, incumber the page by a reference to all the reported cases in which this doctrine has been approved; and I shall merely cite one or two which are leading in point of time, and which may be regarded as examples of the class.¹ Without entering upon any discussion of these two theories, it is enough to say that the latter one has been accepted as expressing the true intent and spirit of the new procedure, and the former has left scarcely any traces in the practical administration of justice in the great majority of the States. The forms contained in the most popular and approved text-books upon practice and pleading furnish a sure test; and, without exception, these are all based upon the method of interpreting the codes last described. And yet with great inconsistency, as it seems to me, the courts have generally held that the ancient forms of common-law pleading in *assumpsit* may be used in actions upon contract, especially where the contract is implied; that they sufficiently meet the requirements of the codes, although they do not set out the actual facts of the transaction from which the legal right arises. Thus, it has been decided that the count in *indebitatus assumpsit* for goods sold and delivered is a sufficient complaint or petition in an

¹ *Milliken v. Cary*, 5 How. Pr. 272; *Williams v. Hayes*, 5 How. Pr. 470; *People v. Ryder*, 12 N. Y. 488, 487. The doctrine of the text was very clearly and accurately stated by Crocker J., in *Bowen v. Aubrey*, 22 Cal. 566, 569. See *contra*, the remarks of Holmes J., in *Meyers v. Field*, 37 Mo. 434, 441. It will be seen in the sequel that the Supreme Court of Missouri stands quite alone—or at least did so until a very recent day—in its theory of interpretation, and retains the distinctions between legal and equitable forms, in as marked a manner as though no change had been made by the statutes.

action to recover the price.¹ The difference between this ruling of the courts and the theory first above stated is, that according to the latter theory the common-law mode of stating a legal cause of action or defence *must* be followed in substance, while by the decisions referred to it *may* be followed in the particular classes of actions described. But even this ruling, although, as I think, a plain departure from the essential spirit of the new system, is of little practical importance; the bar have, with almost absolute unanimity, adopted the method of stating the facts as they occurred, and do not attempt to aver in their stead the legal fictions of promises which are never made, or conclusions of law which are in no sense of the term actual facts. There are other important features of an action — the parties, the union of different causes of action or defence, affirmative relief to the defendant, the form of the judgments, and the like — which have been greatly affected by the general provision of the statute abolishing the distinctions between legal and equitable methods, and the judicial interpretation given thereto; but it is impossible to discuss them in any general manner, and their particular treatment is reserved for subsequent chapters.

SECTION THIRD.

THE COMBINATION BY THE PLAINTIFF OF LEGAL AND EQUITABLE PRIMARY RIGHTS AND OF LEGAL AND EQUITABLE REMEDIES IN ONE ACTION.

§ 76. The general principles of unity, developed in the preceding sections, will now be applied to the several cases which are constantly arising in the practical administration of justice, for the purpose of ascertaining how far the abolition of all distinctions between actions at law and suits in equity has affected the process of stating causes of action, and praying for and obtaining remedies by the plaintiff. It was in this very feature of the

¹ *Allen v. Patterson*, 7 N. Y. 476, 478. Some of the State legislatures have by a statutory enactment set forth forms of pleading under the code, and thus made them regular and valid. It is strange that in some of these the spirit of the code is directly violated, forms of complaints or petitions being sanctioned which are identical with the ancient common counts, and therefore allege fiction instead of facts. See, for example statutes of Indiana.

judicial process — the stating of causes of action, and the obtaining of relief thereon — that the distinction spoken of was exhibited in the most marked manner; and it is in this feature, therefore, that the change must be the most sweeping and radical, if the distinction has in truth been abolished. Under the former system a legal primary right, when invaded, could only be redressed by an action at law, and a legal judgment alone was possible; while an equitable primary right must be redressed or protected in an equity suit and by an equitable remedy. A union or combination of the two classes, either wholly or partially, in one action, was unknown, unless permitted by some express statute, and was utterly opposed to the theory which separated the two departments of the municipal law. The new system not only permits but encourages — and in its spirit, I believe, requires — such a union and combination; for one of its elementary notions is that all the possible disputes or controversies arising out of, or connected with, the same subject-matter or transaction should be settled in a single judicial action.

§ 77. The possible modes or forms of the union or combination by the plaintiff of legal and equitable primary rights and remedies in one suit are the following: (1) Both a legal and an equitable cause of action may be alleged, and both a legal and an equitable remedy obtained; (2) both a legal and an equitable cause of action may be alleged, and the single remedy obtained may be legal or equitable; (3) upon an equitable cause of action, that is, an equitable primary right alleged to have been invaded, a legal remedy may be obtained; (4) upon a legal cause of action, that is, a legal primary right alleged to have been invaded, an equitable remedy may be obtained; and (5) in an action purely legal, that is, where the primary rights asserted to have been invaded, and the remedy demanded, are both legal, the plaintiff may invoke an equitable right or title in aid of his contention, and obtain his remedy by its means. These combinations, I believe, exhaust all possible cases of union on the part of the plaintiff. I shall, therefore, proceed to show how far they are permitted and how far refused in those States which have adopted the reformed system of procedure.

§ 78. When the plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy, and

also to a further legal remedy, based upon the supposition that the equitable relief is granted, and he sets forth in his complaint or petition the facts which support each class of rights, and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form thus adopted. He may, on the trial, prove all the facts averred, and the court will in its judgment formally grant both the equitable and the legal relief.¹ It will be noticed that this proposition embraces only those cases in which the legal relief demanded rests upon and flows as a consequence from the prior equitable relief, but the principle of the rule is not confined to such cases; it extends also to those in which the two remedies, although connected with the same transaction or subject-matter, are not connected as cause and effect.² This is the most complete union of legal and equitable primary rights and remedies in one action which can be made; but it is limited and restricted to those cases in which these rights and remedies arise from the same transaction or subject-matter. It is not generally possible to join one legal cause of action with another entirely independent equitable cause of action, there being no antecedent connection between the two. In the cases described above, where the union is permitted, there is, in fact, no joinder of different causes of action; there is only the union of remedial rights flowing from one cause of action, as will be seen from the judgments of the court in several of the cases cited in the note, and as will be more fully shown in a subsequent chapter. This rule, which has been firmly established by the court of last resort in New York, and which is adopted in all the States with one or two exceptions, has been applied in the following

¹ *Laub v. Buckmiller*, 17 N. Y. 620, 626; *Lattin v. McCarty*, 41 N. Y. 107, 109, 110; *Davis v. Lamberton*, 56 Barb. 480, 483; *Brown v. Brown*, 4 Robt. 688, 700, 701; *Walker v. Sedgwick*, 8 Cal. 398; *Welles v. Yates*, 44 N. Y. 525; *Henderson v. Dickey*, 50 Mo. 161, 165; *Guernsey v. Am. Ins. Co.*, 17 Minn. 104, 108; *Montgomery v. McEwen*, 7 Minn. 351. See, however, *Hudson v. Caryl*, 44 N. Y. 558, which holds that, in an action brought to remove a nuisance, damages can only be awarded by the verdict of a jury, *sed qu.* See, also, *Supervisors v. Decker*, 80 Wisc. 624,

626-630, per Dixon C. J., for a very elaborate opinion in opposition to the doctrine of the text and of the cases cited above in this note.

² See N. Y. *Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357, 359; *Cahoon v. Bank of Utica*, 7 N. Y. 486; *Broiestedt v. South Side R. R.*, 55 N. Y. 220, 222; *Turner v. Pierce*, 34 Wisc. 658, 665, per Dixon C. J.; *Linden v. Hepburn*, 8 Sandf. 668, 671; *Gray v. Dougherty*, 25 Cal. 266. The legal and equitable causes of action should be separately stated. *Gates v. Kief*, 7 Cal. 124; *Magwire v. Tyler*, 47 Mo. 115, 127.

cases among others: in an action by the holder of the legal title to correct his title-deed, to recover possession of the land according to the correction thus made, and to recover damages for withholding such possession;¹ in an action by one holding the equitable title to procure defendant's deed to be cancelled, and a conveyance by defendant to himself, to recover possession and damages, and to restrain defendant from conveying away the land;² in an action by the grantor of land to correct his deed by the insertion of an exception of the growing timber, and to recover damages for trees embraced in the exception wrongfully cut by the grantee;³ in an action to abate a nuisance, to restrain its further commission, and to recover damages therefor;⁴ in an action by a widow to establish her right of dower, to procure it to be assigned, to recover possession and damages;⁵ and in an action by the vendor of land to recover a money judgment on notes given him for the price, and to foreclose his lien on the land itself.⁶

§ 79. In Missouri, however, the judiciary for a long time denied the correctness of this rule, and rejected it under all circumstances in which it could possibly be applied. The doctrine was asserted and maintained in a long series of adjudications that the holder of an equitable title, or the possessor of an equitable primary right, can obtain none but an equitable remedy prosecuted in an equitable form of action. The Supreme Court of that State even went so far as to reject the familiar principle of equity jurisprudence, which permitted the Court of Chancery, having acquired jurisdiction by means of some equitable right, to go on and administer full legal relief in order that the party should not be put to the trouble and expense of a second action at law. In accordance with this narrow view of equity and this narrow construction of the reformed legislation, it was settled that the holder of an equitable title who seeks to enforce his right and to acquire a legal title by means of a specific performance, a cancellation, or a reformation of deeds, must, after obtaining that relief, bring a second action at law to recover the possession. If he unite his equitable claim for cancellation and

¹ *Laub v. Buckmiller*, 17 N. Y. 620.

² *Lattin v. McCarty*, 41 N. Y. 107; *Henderson v. Dickey*, 50 Mo. 161.

³ *Welles v. Yates*, 44 N. Y. 525.

⁴ *Davis v. Lamberton*, 56 Barb. 480; but see *Hudson v. Caryl*, 44 N. Y. 558,

that a jury trial is necessary to the recovery of damages; *Parker v. Laney*, 58 N. Y. 469.

⁵ *Brown v. Brown*, 4 Robt. 688.

⁶ *Walker v. Sedgwick*, 8 Cal. 398.

the like with the legal claim for possession, he was actually to be turned out of court. This remarkable interpretation put upon the language of the statute, and so completely defeating its plain intent, was resorted to in the following, among other instances, which are selected as illustrations merely: in actions brought to set aside and cancel deeds of conveyance made to the defendant, alleged to be fraudulent, and to vest the legal title in the plaintiff, and to recover possession of the premises in question;¹ in an action of partition, where defendant was in possession of the whole land, claiming title therein, it being held that the plaintiff must first establish his legal right by ejectment, and then bring an equity action of partition.² The Supreme Court of Missouri has, however, in a very recent decision, receded from this very extreme position, and has partly at least overruled the authority of the cases referred to in this and the subsequent paragraph. Although the single judgment does not in its reasoning and conclusions accept the liberal views of the New York Court of Appeals in their full scope and extent, yet it plainly tends in that direction, conferring the reliefs of reformation or correction of a deed of conveyance and recovery of possession of the land included in such deed as corrected.³ The judiciary of Wisconsin seem now, alone, among the tribunals of the several States, to reject this liberal theory of interpretation, and to require separate actions for the assertion of legal and equitable rights and the procurement of legal and equitable remedies. The principle of unity approved and adopted by the highest tribunal of New York has been deliberately rejected after a most thorough examination, and the opposite principle, which distinguishes between the two classes of action, and retains their separate use, and prohibits the recovery of legal and equitable remedies in one suit, is avowedly accepted as being the correct construction of the legislative provisions.⁴

¹ *Curd v. Lackland*, 48 Mo. 189; *Wynn v. Corry*, 48 Mo. 301; *Gray v. Payne*, 48 Mo. 203; *Bobb v. Woodward*, 42 Mo. 482; *Peyton v. Rose*, 41 Mo. 257; *Walker's Adm'r v. Walker*, 25 Mo. 367; *Magwire v. Tyler*, 47 Mo. 115, 127; *Rutherford v. Williams*, 42 Mo. 18, 23; *Fithian v. Monks*, 48 Mo. 502, 517.

² *Gott v. Powell*, 41 Mo. 416; *Moreau v. Detchemendy*, 41 Mo. 431.

³ *Henderson v. Dickey*, 50 Mo. 161,

165, per *Wagner, J.* The judgment in this case comments on and condemns the leading decisions referred to in the two preceding notes; and, although it deals too leniently with the gross mistakes into which *Holmes J.* had fallen in announcing the doctrine of those prior cases, yet it squarely overrules their central principle, and destroys their authority.

⁴ *Noonan v. Orton*, 21 Wisc. 238; *Supervisors v. Decker*, 30 Wisc. 624, 626,

§ 80. The next case to be considered is the same in principle, and nearly so in all its features, with the one just discussed. The plaintiff, as in the last instance, possesses primary rights, both legal and equitable, arising from the same subject-matter or transaction, and is entitled to some equitable relief, reformation, cancellation, specific performance, and the like, and to legal relief based upon the assumption that the former relief is awarded; he avers all the necessary facts in his pleading, and demands both the remedies to which he is entitled. The court, instead of formally conferring the special equitable remedy and then proceeding to grant the ultimate legal remedy, may treat the former as though accomplished, and render a simple common-law judgment embracing the final legal relief which was the real object of the action.¹ This proceeding is plainly the same in principle with the one stated in the foregoing paragraph; but it is a more complete amalgamation of remedies, a more decided departure from the notions which prevailed under the former system. By the omission of the intermediate step, the actual result is reached of a legal remedy based upon an equitable primary right or title. No doubt this omission of the intermediate step is often as advantageous to the plaintiff as though it had been taken in the most formal manner; but, on the contrary, it will sometimes happen that the formal change of his equitable title into a legal one by a decree of cancellation, or of specific performance or reformation, will be necessary to secure and protect his rights in the future. As a matter of safety and prudence, the particular form of judgment just described should only be used in actions upon executory contracts where a pecuniary payment exhausts their efficiency; in actions involving titles to land the full judgment—embracing the equitable relief as well as the legal remedy of possession—would generally be far preferable. The rule permitting such a

per Dixon C. J.; *Horn v. Luddington*, 82 Wisc. 78. The first of these cases was an action brought to compel the specific performance of an agreement to give a lease. The complaint also alleged a breach of a covenant which was to have been contained in the lease, and demanded a judgment for the damages arising therefrom as well as for the specific performance. Held, that the two could not be combined; that the plaintiff must first obtain the lease, and then bring his action

for a breach of the covenant in it. The judgment of Dixon C. J. in *Supervisors v. Decker* is an exhaustive discussion of this subject, with a review of the leading authorities. Although there is much in his opinion that is correct and admirable, he reaches, as his main conclusions, positions which are in direct conflict with the letter as well as the spirit of the codes.

¹ *Bidwell v. Astor Ins. Co.*, 16 N. Y. 268, 267; *Phillips v. Gorham*, 17 N. Y. 270; *Caswell v. West*, 8 N. Y. Sup. Ct. 383.

single legal remedy has been applied in the following among other instances: in an action upon an insurance policy which by mistake was so drawn that the plaintiff—the assured—had no claim for damages, he demanded judgment (1) reforming the instrument, (2) recovering \$7,000 for a loss embraced within its terms as thus reformed, and the court ordered a judgment merely for the amount of the loss as claimed;¹ in an action to recover lands of which the plaintiff had the equitable title only, the legal title being in the defendant by means of a deed of conveyance from the plaintiff's ancestor, the former owner, regular on its face, but alleged to have been obtained by fraudulent representations, instead of directing a cancellation of this deed and a reconveyance to the plaintiff, the court granted a judgment for the recovery of possession directly;² in an action upon a contract for the building of a house according to certain specifications, the complaint alleging a mistake in the specifications as set out in the written instrument, and averring a performance according to the specifications actually agreed on by the parties, and demanding judgment for the amount due for such services without praying for any reformation of the contract, the action in this form was sustained, and it was expressly held that no prayer for a correction was necessary.³ The rule here stated, and the decisions which sustain it, are plainly in direct opposition to the doctrine which originally prevailed in the Missouri courts, and which still receives the approval of the Wisconsin judges.

§ 81. Another case, varying in some of its circumstances from the two which have been described, and yet depending upon the same principle, remains to be considered. If the plaintiff possesses, or supposes himself to possess, primary rights, both legal and equitable, arising from the same subject-matter or transaction, and avers the necessary facts in his pleading, and prays for both the remedies corresponding to the two different rights, but on the trial fails to establish his equitable cause of action and his consequent right to the equitable remedy, his action should not be therefore dismissed; he should recover the legal judgment which the legal cause of action demands.⁴ Thus, in an action on

¹ *Bidwell v. Astor Ins. Co.*, 16 N. Y. 268.

² *Phillips v. Gorham*, 17 N. Y. 270.

³ *Caswell v. West*, 8 N. Y. Sup. Ct. 388.

⁴ *McNeady v. Hyde*, 47 Cal. 481, 488,—

action to recover possession of land, and for an injunction; *Sternberger v. McGovern*, 56 N. Y. 12, 21, 15 Abb. Pr. n. s. 257, 271, — specific performance and damages.

a policy of insurance, all the necessary facts being alleged, the complaint demanded a money judgment on account of a loss, and also that the instrument should be reformed by reason of an alleged mistake, which reformation, if made, would increase the sum insured, and enable the plaintiff to recover a larger amount. On the trial he failed to prove the averments respecting the mistake, and was not, therefore, entitled to any equitable relief. The New York Court of Appeals held that judgment should have been recovered on the legal cause of action for the sum which was actually insured, and reversed the ruling below which had dismissed the action.¹ As another illustration: in an action by the grantor of land against the grantee to set aside the deed of conveyance on the ground that it was procured by false and fraudulent representations, after setting out all the facts which constituted the transaction, the complaint prayed for two remedies in the alternative, — (1) damages for the deceit, (2) cancellation and a reconveyance. A reconveyance was found to be impossible on the trial, because the defendant had conveyed the premises to *bona fide* purchasers. A simple legal judgment for the damages caused by the deceit was granted, and was held to be proper by the general term of the New York Supreme Court.² This rule is now established, except in the one or two States which retain the distinctions between legal and equitable actions; but there are some earlier *dicta*, and even decisions opposed to it,³ which, however, must be considered as overruled.⁴

§ 82. In each of the foregoing instances the complaint has stated all the necessary facts constituting both grounds for relief, and has actually demanded both remedies in the prayer for judgment. Another case presents itself with a change of features. The averments of fact are the same, but the plaintiff demands only the special equitable remedy to which he deems himself entitled. On the trial he fails to prove the alleged grounds for equitable relief, but does establish a case for the legal relief which was not demanded in the prayer for judgment, although all the necessary facts, from which the remedial right arose,

¹ N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357, 359.

² Graves v. Spier, 58 Barb. 349, 383, 384; and see Sternberger v. McGovern, 15 Abb. Pr. n. s. 257, 271, 56 N. Y. 12.

³ See Penn. Coal Co. v. Del. & Hudson Canal Co., 1 Keyes, 72. The reporter's

head-note is not sustained by the decision of this case. A *dictum* of Mr. J. Emott, at p. 76, is the sole ground for it; and even this *dictum* is not so broad as the head-note.

⁴ See Davis v. Morris, 36 N. Y. 569.

were averred. It is now, after some hesitation, settled that even in this case the plaintiff is not to be dismissed from court, but should be permitted to recover the legal remedy supported by the allegations of fact contained in the complaint or petition.¹ There are *dicta* in opposition to this rule,² but they are all overruled by the subsequent and more authoritative decisions in the same States. In Missouri this liberal doctrine has not been adopted, since, as has been already seen, the principle of uniting legal and equitable causes of action and remedies in one suit has been rejected in all its phases. The modification of its earlier notions, which the Supreme Court of that State has made in its latest decisions, does not necessarily extend to the case under consideration.³ The Supreme Court of Wisconsin seems, also, to have abandoned the position which it originally occupied in reference to the particular subject in question, and now refuses to award a legal remedy to a plaintiff who has only demanded equitable relief.⁴

¹ *Marquat v. Marquat*, 12 N. Y. 386; *Barlow v. Scott*, 24 N. Y. 40, 45; *Cuff v. Dorland*, 55 Barb. 481; *Graves v. Spier*, 58 Barb. 349; *Tenney v. State Bank*, 20 Wisc. 152; *Foster v. Watson*, 16 B. Mon. 377, 387; *Leonard v. Rogan*, 20 Wisc. 540; *White v. Lyons*, 42 Cal. 279. In *Leonard v. Rogan*, Dixon C. J. said (p. 542): "If the plaintiff demands relief in equity when upon the facts stated he is only entitled to a judgment at law, or *vice versa*, his action does not as formerly fail because of the mistake. He may still have the judgment appropriate to the case made by the complaint." In *White v. Lyons*, Mr. Justice Crockett (at p. 282), states the general doctrine in a very accurate and comprehensive manner, and a quotation from his judgment will be found *ante*, in note to § 70.

² See, for example, *Mann v. Fairchild*, 2 Keyes, 106, 111; *Haywood v. Buffalo*, 14 N. Y. 584, 540. Neither of these cases decides the point stated by the reporter in *Mann v. Fairchild*; but each contains a *dictum* which is certainly strong enough. In the former, Potter J. says: "If a party brings an equity action even now when the same court administers both systems of law and equity, the party must maintain his equitable action on equitable

grounds or fail, even though he may prove a good cause of action at law on the trial." This proposition is certainly incorrect if the party has averred his legal cause of action, even though he may not have demanded the legal remedy thereon.

³ *Myers v. Field*, 37 Mo. 434. As to the extent of the recent modification, see *Henderson v. Dickey*, 50 Mo. 161.

⁴ *Horn v. Luddington*, 32 Wisc. 73. The complaint alleged moneys advanced and services rendered by plaintiff to defendant under an oral agreement that the latter would convey certain lands, and demanded judgment for a specific performance. Deciding that no case was made out for a specific performance, the court also held that the plaintiff could not recover for the moneys advanced and the services rendered; and that in such an equitable action a legal remedy could not be obtained, relying upon the authority of *Supervisors v. Decker*, 30 Wisc. 624, 626. The conflict between this ruling and that of the same court in *Leonard v. Rogan*, 20 Wisc. 540, 542, is direct. I make no attempt to reconcile them. See *Dickson v. Cole*, 34 ib. 621, 625; *Turner v. Pierce*, 34 ib. 658, 665; *Deery v. McClintock*, 31 ib. 195.

§ 83. The phases and combinations to which the liberal principle has thus far been applied have resembled each other in this, that in all of them the plaintiff was clothed with a double remedial right and both a legal and an equitable cause of action; in those which are now to be examined, the plaintiff claims but one remedial right, and sets up but one cause of action. When the complaint or petition alleges a case which entitles the plaintiff to equitable relief, but no basis for legal relief is stated, and prays a common-law judgment, but no equitable remedy of any kind, if the case as alleged is proved upon the trial the equitable remedy which is appropriate to it should be awarded. Disregarding the prayer or demand of judgment, the court will rely upon the facts alleged and proved as the basis of its remedial action. This application of the general principle has been made in a case where the complaint or petition stated facts entitling the plaintiff to an accounting as against the defendant in respect of a joint undertaking, but not to a judgment for a sum certain. The prayer, however, was for the ordinary money judgment. The New York Court of Appeals held that this action should not have been dismissed, but that a judgment for an accounting should have been granted.¹ The rule in Missouri seems to have been settled in an entirely different sense.²

§ 84. If, however, the complaint or petition contains a case entirely for equitable relief, stating no facts upon which a legal remedial right arises, and prays a judgment awarding the equitable relief alone, but on the trial the plaintiff fails to prove the case as thus alleged, but does establish a legal cause of action not averred in his pleading, his suit must be dismissed; he cannot recover the legal remedy appropriate to the facts which he succeeds in proving.³ There is no conflict between this and any

¹ *Emery v. Pease*, 20 N. Y. 62, 64. See, however, *Russell v. Byron*, 2 Cal. 86; *Buckley v. Carlisle*, 2 Cal. 420; *Stone v. Fouse*, 3 Cal. 292; *Barnstead v. Empire Mining Co.*, 5 Cal. 299. In all these cases, the court, while holding that the plaintiff could not recover a judgment for a certain sum, did not give judgment for an accounting. The question, however, was not raised; *Blood v. Fairbanks*, 48 lb. 171, 174.

² *Maguire v. Vice*, 20 Mo. 429; *Richardson v. Means*, 22 Mo. 495; *Myers v. Field*, 37 Mo. 484.

³ *Bradley v. Aldrich*, 40 N. Y. 504. This case is important, as it lays down the proper limitations upon the doctrine of some prior decisions which I have cited. These former adjudications might perhaps be wrested from their true meaning and claimed to be authorities for granting remedies which had not been demanded, and for which no ground had been alleged in the pleadings. The facts of this case and the language of the judgment should be carefully noticed in order to fix the exact line of distinction between

of the preceding propositions; in fact, the one principle governs them all. This principle is that the court looks to the facts *alleged* and proved, and not to the prayer for relief. If the facts entitling a party to a remedy, legal or equitable, are *averred* and proved, he shall obtain that remedy, notwithstanding his omission to ask for it in his demand of judgment; and, if the facts were not averred, he shall not obtain the remedy, although he demanded it in the most formal manner. The reform legislation has not dispensed with the allegations of fact constituting a cause of action; on the contrary, it has made them, if possible, more necessary than under the old system. The converse of the rule above stated is also true. If the plaintiff sets forth a case entirely for legal relief, and prays a legal judgment alone, and at the trial fails to prove the averments actually made, he cannot establish an equitable cause of action not pleaded, and recover an equitable remedy thereon.¹

§ 85. The principle may be applied in still another form or combination of circumstances. In a purely legal action, or, to speak more correctly, in an action where the plaintiff sets forth and mainly relies upon a legal primary right or title, and asks a remedy which is purely legal, he may still invoke the aid of an equitable right or title which he holds, or of which he may avail himself, in order to maintain his contention, and obtain the legal relief which he seeks. This is a more indirect union of legal and equitable rights and causes of action than exists in any of the instances heretofore discussed; but it is none the less such a union.²

it and the former ones which support the general doctrine of the text. The final judgment for damages on account of the deceit was reversed, because the complaint contained no averment of any damages sustained, and not because a judgment for damages cannot be rendered in the same suit which contains also an equitable cause of action. The addition of certain averments to the complaint would have made this case identical with *Graves v. Spier*, *supra*.

¹ *Drew v. Ferson*, 22 Wisc. 651. This case resembles *Emery v. Pease*, *supra*, and might be confounded with it. The distinction, however, is plain upon examination, and at once removes any appear-

ance of conflict. In *Emery v. Pease*, the complaint stated facts showing that the plaintiff was entitled to an accounting, although it prayed for a money judgment. In *Drew v. Ferson*, the pleading set out simply a case to recover money laid out and expended; it did not contain any allegation upon which to base a judgment for accounting. In the former case, therefore, it was proper to grant the equitable remedy, and in the latter it was proper to dismiss the suit; there is no conflict.

² *Sheehan v. Hamilton*, 2 Keyes, 304; 8 Abb. Pr. n. s. 197. This was an action to recover possession of land. *Livingston*, the original owner, had demised the land to one Taylor by a perpetual lease,

§ 86. As to the mode of trial when the complaint or petition sets forth an equitable and a legal cause of action, there is some diversity in the practice of the several States. The constitutions protecting the jury trial in common-law cases in which it had been customarily used, the defendant may, of course, insist that the legal issues shall be passed upon by a jury. He may waive this right by a stipulation in writing, by an oral stipulation made in open court, by failing to appear on the trial, and perhaps by permitting the trial to be actually entered upon without objection. If the litigant parties, or either of them, assert their rights as thus stated, it is settled in New York that the legal issues must be tried at a circuit court, or at a trial term of the court in which the action is pending ;¹ and it seems that all the issues, legal and equitable, must thereupon be tried together in the same manner, for it is said that "no provision is made for two trials of the issues joined in the same action."² If a cause is brought on to trial before the court sitting without a jury—in New York, the special term—as an equity cause, and the trial is commenced under that supposition, the defendant not waiving his right by acquiescence, and the court, in the course of the investigation, discovers that it involves separate legal issues, the complaint should not be dismissed on that account ; the trial should be suspended, and the case sent to the Circuit or other court possessing a jury.³ The same rule prevails generally in other States. A mistake in bringing on the cause for trial is to be corrected by simply sending it to the proper court or placing it upon the proper docket.⁴ In some of the States provision is made for the

reserving a rent-charge with a clause of re-entry. L. assigned this rent-charge and all his rights to Dr. Clarke, who died in 1846, and the plaintiff is his heir-at-law. The action is brought to recover the land on account of failure to pay the rent. The defence was as follows : Taylor had given a mortgage on the land which had been foreclosed, and the land was bought by Dr. Clarke in 1831, and was by him conveyed to one Risley and from him by mesne conveyances to the defendant. The defendant's contention was that Dr. Clarke in 1831, being owner both of the land and of the rent-charge, the latter merged and was extinguished. In reply, the plaintiff proved that Dr. Clarke did not intend that the rent-charge

should merge, but that it should be kept alive. The General Term of the Supreme Court held that this doctrine of non-merger was purely equitable, and could not be invoked by the plaintiff in this legal action, and that the plaintiff should have first established the rent-charge in an equitable action, and then brought this action of ejectment. The Court of Appeals reversed this decision, and laid down the doctrine of the text.

¹ *Davis v. Morris*, 36 N. Y. 569 ; *People v. Albany, &c.*, R. R., 57 N. Y. 161, 174.

² *Ibid.* p. 572, per Grover J.

³ *Ibid.* p. 573.

⁴ *Trustees, &c. v. Forrest*, 15 B. Mon. 168 ; *Foster v. Watson*, 16 B. Mon. 377, 387 ;

trial of the issues separately and at different times. The equitable issues may be tried first and the legal issues afterwards, or the order may be reversed as the nature of the case and the relations of the issues seem to require.¹

SECTION FOURTH.

EQUITABLE DEFENCES TO ACTIONS BROUGHT TO ENFORCE LEGAL RIGHTS AND TO OBTAIN LEGAL REMEDIES.

§ 87. Another practical effect of removing the distinction between actions at law and suits in equity is shown in the employment of equitable defences to actions brought to enforce legal rights and to obtain legal remedies. The ancient system knew of no such union, and a thorough-paced lawyer of the old school would have deemed it incestuous. Legal rights set up by the plaintiff must be met in the same action by legal rights set up by the defendant. If the defendant, when prosecuted in an action at law, had an equity which, if worked out, would defeat the recovery, his only mode of redress was to commence an independent suit in chancery by which he might enforce his equitable right, and in the mean time enjoin his adversary from the further prosecution of the action at law. A single familiar example will illustrate the situation. A. has entered into a contract with B. to convey to the latter a farm on payment of the price, and lets him into possession. The price is paid in full, so that the vendee is fully entitled to his deed. A., in this position of affairs, commences an action of ejectment to recover possession of the land. By the common-law system B. would have no defence whatever to *that* action; the *legal* title is in the plaintiff, and his own title and right to a deed, being equitable, were not recognized by courts of law as any defence. Of course a municipal law which did not furnish *some* means of enforcing B.'s right and defeating A.'s action would be incomplete, and unfitted for a civilized people. The

Sale v. Crutchfield, 8 Bush. 686, 644. If an action is wrongly transferred to the equity docket when no valid equitable issues are presented by the pleadings, this is error which requires a new trial. *Creager v. Walker*, 7 Bush, 1, 8.

¹ *Massie v. Stradford*, 17 Ohio St. 596; *Petty v. Malier*, 15 B. Mon. 591, 604;

Smith v. Moberly, 15 B. Mon. 70, 73; *Bennett v. Titherington*, 6 Bush (Ky.), 192. See *Guernsey v. Am. Ins. Co.*, 17 Minn. 104, 108; *Harrison v. Juneau Bank*, 17 Wisc. 840; *Du Pont v. Davis*, 85 Wisc. 631, 639; and see *Richmond v. Dubuque*, 85 R. R., 88 Iowa, 422, 489-491.

common law provided a means, but it was cumbrous, dilatory, and expensive. B. commences a suit in the Court of Chancery, sets forth the agreement to convey and all the other facts from which his equitable title arises, alleges the pending ejectment brought by the vendor, and prays for the proper relief. It is important to notice the extent and nature of this relief, because it throws light upon questions which now arise concerning the doctrine of equitable defences. The vendee might content himself with asking and obtaining an injunction which would stay the pending ejectment, and leave him in possession undisturbed by that action, but would plainly not be a perfect and lasting protection in the future. To end the matter and to secure himself absolutely, he must ask and obtain the affirmative remedy of a specific performance and a conveyance from A. to himself. This being done, he is armed with the *legal* title, and can defend *any legal* action brought against him by the vendor or his heirs or grantees. Nothing could be devised more cumbrous than this double litigation to enforce one right and to end one controversy. Nothing could be more simple, natural, and necessary than the reform which permits the equitable right to be pleaded and proved in the action at law; and yet, when the change was made by the legislature, experienced and learned lawyers and judges denounced it, and strove to render it merely nominal. Even at the present day, and in States where the liberal doctrine has been accepted and has received the sanction of the highest tribunals, individual members of the bench will occasionally raise their voices in strenuous opposition; and in one or two of the States an interpretation has been placed upon the statute which confines its beneficial operation within the narrowest limits. The subject-matter of the present section naturally separates itself into three divisions, and the discussion will follow that order: (1) What is an equitable defence? (2) When may an equitable defence be interposed in an action purely legal, which will include the joinder of equitable and legal defences in the same suit? and (3) When can affirmative relief against the plaintiff be granted to the defendant upon the equitable defence which he sets up?

§ 88. What is an equitable defence? It is to be observed that this term contains two distinct words, and that the separate meaning of each is essential to the complete and accurate conception of the whole, — “equitable” and “defence.” Equitable is

used in its technical sense as contrasted with legal ; that is, the right which gives it its efficacy is an equitable right, — a right formerly recognized and enforced only in courts of equity, and not in courts of law. The notion involved in the word “defence” is, however, the most important to observe. In its juridical signification, a defence is something which simply prevents or defeats the recovery of a remedy in an action or suit, and not something by means of which the party who interposes it can obtain relief for himself. If the codes had merely in express language authorized the defendant to set up equitable *defences*, but had not enacted any further provisions in reference to the subject-matter, the granting of affirmative equitable remedies to the defendant could not have been inferred from such permission. A “defence” is essentially negative, and not affirmative. The facts from which the defensive right arises may perhaps, in a proper occasion and when employed for that purpose, be made the basis of affirmative relief ; but, when so employed, they would not be a defence. In short, a defence is not to be conceived of as the means of acquiring positive relief or any remedy, legal or equitable. When, therefore, the statute permits an equitable defence to be interposed in a legal action, it merely contemplates the fact that the equitable right averred shall prevent the plaintiff from recovering the legal remedy he is pursuing by his action. If to this negative effect is added the privilege of obtaining an affirmative judgment against the plaintiff, based upon the same equitable right, the latter so far ceases to be a “defence,” and becomes in turn a cause of action. The action itself thus assumes a double aspect ; each litigant party in this respect becomes an actor, and each a defendant. This analysis may appear to be, and certainly is, elementary and familiar ; but it is needed to clear up some confusion and difficulties into which certain courts have fallen in reference to the subject under consideration. These courts, as will be seen in the sequel, would restrict the operation of the reform to those cases in which the defendant asks and obtains some specific affirmative equitable relief against the plaintiff ; in other words, to those cases in which the equitable right relied upon by the defendant *is not used as a defence at all*, but is averred as a true cause of action. This construction is, as it seems to me, a palpable error, and it deprives the legislative provision of half its efficacy.

§ 89. A few years ago the British Parliament, among its many legal reforms, enacted that in England an equitable defence might be pleaded in an action at law. In giving construction to this remedial statute, the English courts of law held that no such defence was admissible,—in other words, they would recognize and enforce no such defence,—unless it were of such a nature that courts of equity, in accordance with their well-settled doctrines, would, if the same facts were set out in a bill of complaint, grant an immediate injunction restraining the further prosecution of the action at law. This construction of course destroyed the practical utility of the statute. The American courts have not followed this extremely narrow interpretation.

§ 90. A defence is a right possessed by the defendant arising from the facts alleged in his pleadings which defeats the plaintiff's claim for the remedy which he demands by his action. An equitable defence is such a right which was originally recognized by courts of equity alone. A concise and accurate definition was given by one of the members of the New York Court of Appeals in an early case. "Under the head of equitable defences are included all matters which would before have authorized an application to the Court of Chancery for relief against a legal liability, but which at law could not be pleaded at bar. The facts alleged by way of defence in this action would have been good cause for relief against the judgment in a court of chancery [the suit was brought on a judgment], and under our present system are, therefore, proper matters of defence."¹ Another judge said in the same case: "An equitable defence to a civil action is now as available as a legal defence. The question now is, Ought the plaintiff to recover? and any thing which shows that he ought not is available to the defendant, whether it was formerly of equitable or of legal cognizance."² I need not pursue this analysis further; the instances in which equitable defences have been sustained, as given in the cases hereafter cited, will explain and illustrate their nature more clearly than any abstract definition or description.

§ 91. Express as is the language of the statutes, and well established as is the juridical nature of "defence" in general, the doctrine has been strenuously maintained, and is supported by

¹ *Dobson v. Pearce*, 12 N. Y. 156, 166, per Allen J.

² *Dobson v. Pearce*, 12 N. Y. 156, 168, per Johnson J.

the decisions of respectable courts, that a defendant cannot avail himself, as a defence, of facts entitling him to equitable relief against the plaintiff's legal cause of action, unless he does it by demanding and obtaining that specific remedy which, when granted, destroys the cause of action; in other words, he cannot invoke the right *as long as he treats it and relies upon it as a defence*. If he does not institute a separate action based upon his equitable right, and recover the specific relief therein, and restrain the pending action at law, he must at least, in the answer pleaded to that action at law, affirmatively demand the equitable remedy, and this remedy must be conferred upon him. If he simply avers the facts as a negative defence, he will not be permitted to rely upon them, and to defeat the plaintiff's recovery by that means. Certain of the cases which announce this doctrine, together with the reasoning by which it is sustained, will be found in the foot-note.¹ The error of this doctrine has already

¹ *Follett v. Heath*, 15 Wisc. 601; *Conger v. Parker*, 29 Ind. 380; *Hicks v. Shepard*, 4 Lans. 335, 337; *Cramer v. Benton*, 60 Barb. 216. See, also, *Kenyon v. Quinn*, 41 Cal. 325; *Lombard v. Cowham*, 84 Wisc. 486, 492; *Dewey v. Hoag*, 15 Barb. 366. As this doctrine is insisted upon in these cases with great emphasis, and as some of them are very recent, and are in direct opposition to other decisions in the same States, I shall give the views of the courts at length. *Follett v. Heath* was an action to recover possession of chattels. The defendant answered by way of equitable defence. He claimed the chattels under a chattel mortgage, given thereon by the plaintiff, which was intended to secure a certain note executed by the plaintiff, which had become due; but by mutual mistake it was made to secure another note of the plaintiff which was not yet due. The answer asked in the usual form for a return of the goods which had been taken by the plaintiff, but did not pray for a reformation of the mortgage. This answer, it was held, disclosed no defence to the action. In his judgment, Paine J. said (p. 602): "It is true that equitable defences may now be interposed. But the facts here sought to be interposed do not constitute any equitable defence, if they were established. The papers having been made wrong by

mistake, the parties are bound by them unless they take some appropriate method to correct the mistake. That method is not to prove the mistake in an action at law, and have the same benefit as though the instruments were reformed; but it is to bring an equity action to reform the instrument, so that it can have its proper legal effect. . . . Equity aids in such cases by reforming the contract, not by giving effect to it without being reformed." The learned judge here speaks as though the ancient system of separate equity and common-law jurisdictions still existed in full force and effect, and as though the legislature had not made its sweeping reform by combining the two into one mode of administering justice. In *Conger v. Parker* the complaint alleged a conveyance from defendant to plaintiff, by a deed containing the usual covenants, of a farm on which were several growing crops, — naming them, — among which was a crop of wheat; and that defendant took and converted these crops to his own use. The answer set up an agreement that the wheat crop was to be excepted from the conveyance, but that by mistake this exception was omitted from the deed. There was no prayer for a reformation. The court held this answer bad: (1) because it did not go to the whole cause of action, and (2) as stated by Frazer J.,

been demonstrated. A defence is a *negative* resistance, an obstacle, a something which prevents a recovery, whether it be equi-

p. 381: "The answer is bad for another reason. When a mistake in a deed or other written instrument is relied on, the pleading should go further than is done in this case. It should have prayed affirmative relief, that the instrument be reformed, so as to show the contract intended to have been embodied in it, and that, when so reformed, it might be allowed as a bar to the suit, or to so much thereof as it would bar. This might be done by an answer in the nature of a cross-bill in equity. It is not necessary, under the code, to bring an independent suit for the purpose as it was formerly when the original suit was at law." The Indiana court here lays down a more precise and positive rule than was done in the Wisconsin case, which leaves it doubtful whether the defendant can obtain affirmative relief in the original action upon his answer, or whether he must bring a separate equitable suit for that purpose. *Hicks v. Sheppard* and *Cramer v. Benton* are two quite recent decisions of the general term of the Supreme Court in New York, the opinion in each being delivered by the same judge. They are in such direct antagonism with several judgments of the highest tribunal of that State that they naturally require a special notice. The first was an action to recover lands, the plaintiff claiming under a deed from defendant to H. and M., who were the grantors of the plaintiff by a deed with a covenant of warranty. The answer alleged, as an equitable defence, that the deed from defendant to H. and M. included the lands in question through a mistake, and prayed a reformation. On the trial, the court found the mistake, sustained the defence, and held the plaintiff not entitled to recover; but from the absence of the proper parties the deed to H. and M. could not be reformed in that action. The General Term on Appeal held, in an opinion delivered by Talcott J. (p. 337), that the defence was based solely upon defendant's right to have his own deed actually reformed; that such affirmative relief could not be granted in this action, because H. and M. were not parties thereto; and, therefore, defendant

could not avail himself of his right as a defence. *Cramer v. Benton* was also an action to recover land. The premises in question were originally owned by defendant and his brother Lewis B. in common; they executed deeds of partition; in one deed defendant conveyed all his interest in the premises in question and other lands to Lewis B., and through divers mesne conveyances the same were finally conveyed to the plaintiff, the defendant, however, remaining in possession during the entire period. The answer alleged a mistake in the original deed from defendant to his brother Lewis by means of which the premises were improperly included therein, and that this mistake had been repeated in each deed down to the one which transferred the title to the plaintiff. Neither the brother Lewis B. nor any of the intermediate owners were parties. On the trial the defence was established, and the complaint was dismissed without any affirmative relief to the defendant. Talcott J. delivered the opinion of the General Term on Appeal, and, after quoting the section of the code which expressly permits equitable defences, he proceeds (p. 226): "This seems to have been construed to embrace equitable causes of action affecting the equitable right of the plaintiff to enforce his legal cause of action, and probably such was the intention of the provisions referred to. In this enlarged sense an equitable defence or counter-claim to a legal cause of action can mean nothing less than such a state of facts and parties as would induce a court of equity to interfere, and restrain the prosecution of the action at law." He goes on to hold that there must be such a case as would induce a court of equity to reform the deed; not that an actual judgment of reformation must necessarily be pronounced if the defendant waives it, or does not demand such full relief, but there must be the same facts which would be the basis of such a decree giving that affirmative relief. In the present case a court of equity would not grant the relief, because the proper parties were not before the court. Judge Talcott avoids the

table or legal. If every equitable defence, in order to be available, must consist in an affirmative recovery of specific relief against the plaintiff, or at least in the right to recover such relief if the defendant choose to enforce it, for exactly the same reasons, and with exactly the same force, it might be said that every legal defence, in order to be available, must consist of an offset or counter-claim. In fact, the codes without exception recognize the correctness of the rule stated in the text. The sections which prescribe the form and contents of the answer enumerate "defences," legal and equitable, and counter-claims. A recovery of equitable relief by defendant is as truly a counter-claim as the recovery of pecuniary damages;¹ and the statute thus expressly

exactly contrary ruling of the Court of Appeals in *Dobson v. Pearce*, 12 N. Y. 156, and *Phillips v. Gorham*, 17 N. Y. 270, by asserting that the point in question was not brought to the attention of that high tribunal when they made their decisions in those cases. The doubtful and hesitating manner in which the learned judge speaks of equitable defences in general at the commencement of the above quotation is somewhat remarkable in the face of the express requirements of the statute, and of repeated decisions made by the courts of this and other States in giving construction thereto. The conclusion at which he arrives is in exact opposition to the very *ratio decidendi* of the Court of Appeals in the cases referred to; and the assumption that the real point involved in the discussion had escaped the attention of that court is, to say the least, gratuitous. The fallacy running through the whole judgment is the confounding of facts and rights arising therefrom used *defensively*, and the same facts used as the basis of *affirmative* relief. In *Kenyon v. Quinn*, 41 Cal. 825, which was an action to recover land, the plaintiff held the legal title in trust for the defendant, while the defendant held the equitable title, and could have compelled a conveyance; but the defendant did not plead any of these facts, nor any equitable defence, in his answer. The court held that an equitable title must be pleaded, and appropriate relief must be demanded, in the answer; and, this not being done, the defence could not be proved. The same point was decided

in *Cadiz v. Majors*, 88 Cal. 288; *Clark v. Lockwood*, 21 Cal. 220. The position here taken, to the effect that affirmative relief must be demanded in the answer, is a mere *dictum*. The objection that the defendant had omitted to set up his equitable defence at all plainly disposed of the whole case. The question is put at rest in California. *Bruck v. Tucker*, 42 Cal. 352; *Miller v. Fulton*, 47 Cal. 146. Later Wisconsin cases have settled the rule for that State; and, in fact, a special provision of the code leaves no doubt. R. S. ch. 141, § 7, expressly requires the defendant, in pleading an equitable defence, to demand such affirmative relief as he is entitled to. In *Lombard v. Cowham*, 34 Wisc. 486, 492, the court said, "The defence, being an equitable one, to be available in an action of ejectment, must be set up in the answer, and be accompanied by a demand for such relief as the defendant supposes himself entitled to. A mere equitable defence is not sufficient; there must be a counter-claim also." It was further said that *Kent v. Agard*, 24 Wisc. 378, does not conflict with this doctrine. See *Du Pont v. Davis*, 35 Wisc. 634, 639; *Hills v. Sherwood*, 48 Cal. 336, 392. In Minnesota it is said that an equitable defence in an action to recover land must be so strong and clear an equitable title in the defendant as, in the absence of fraud or mistake, to entitle him to a decree for a conveyance on a bill for that purpose. *McClane v. White*, 5 Minn. 178, 190.

¹ See *infra*, chap. iv., sec. 6. Affirmative relief will of course be given in

distinguishes between equitable *defences* as such and the recoveries of affirmative equitable relief. The cases which will be referred to in subsequent paragraphs show that the overwhelming weight of authority sustains the doctrine which I have stated as the correct construction of the codes.

§ 92. I now pass to the consideration of the cases in which equitable defences have been admitted. It will be impossible to state any exhaustive rule derived from the decisions thus far made by the courts; for it cannot be supposed that they have exhausted the instances in which this species of defence is proper. There does not seem to be any limit to the use of such defences other than is found in the very nature of equity jurisprudence itself. Whenever equity confers a right, and the right avails to defeat a legal cause of action, — that is, shows that the plaintiff ought not to recover in his legal action, — then the facts from which such right arises may be set up as an equitable defence in bar. There can be no other limitation, unless we would defeat the plain intent of the statute, and return to the old method of granting to the defendant a decree in equity from which a *legal* defence may arise. The following cases are intended as illustrations and examples rather than as a full enumeration of the possible instances in which the defence may be interposed.

§ 93. In an action brought to recover damages for the breach of covenants contained in a deed of conveyance, the defendant may set up, as an equitable defence, a mistake in the instrument which should be corrected; as, for example, in such an action on a covenant against incumbrances, the alleged breach being an outstanding mortgage, the defendant may show the original agreement to except such mortgage from the operation of the covenant, and that by mistake the exception was omitted.¹ In an action upon a judgment recovered against the defendant, the latter pleaded that the judgment was originally obtained by fraud, and that he had instituted a suit in equity against the judgment creditor in the State of Connecticut, in which the judgment had been decreed to be void, and its enforcement had been enjoined. These facts constituted a perfect equitable defence

proper cases. As an illustration, see *Blake v. Buffalo Creek R. R.*, 56 N. Y. 485, 498, 494; *Bailey v. Bergen*, 4 N. Y. Sup. Ct. 642.

¹ *Haire v. Baker*, 5 N. Y. 357. The

New York Court of Appeals held in this case that the defendant could set up this matter as a defence, but could not have any affirmative relief. This latter position has been since abandoned by the court.

and complete bar to the action.¹ In an action to recover damages for the non-performance of an executory contract to run a steamboat on a certain route for the plaintiff, the answer alleged a mistake in drawing the contract by which a proviso was omitted that would have excused the defendant's failure to perform, and prayed a reformation. The New York Court of Appeals sustained the defence, saying: "The court below clearly erred in holding that the equitable defence could not be tried in this action. That it could be is too thoroughly settled to admit of further dispute."² The defence may arise from facts occurring subsequent to the joinder of issue, and require to be interposed in a supplemental answer. On the day of trial of an action for work and labor, the parties met, had a negotiation, and settled the controversy, by the terms of which settlement the suit was to be abandoned. The plaintiff afterwards repudiating the compromise and proceeding with the trial of the cause, the defendant, after tendering performance, was permitted to set up the facts in a supplemental answer; and it was held that they constituted a perfect equitable bar.³

§ 94. The action to recover possession of land — analogous to ejectment — is the one in which the equitable defence is the most frequent; and here, of course, it assumes a great variety of shapes.⁴ Those, however, which are the most common are the right to a correction of either the plaintiff's or the defendant's muniments of title because of mistakes therein; the right to a specific performance by the plaintiff of his contract to convey the land; and the right to a cancellation of a conveyance on the ground of fraud. These three classes of defences are found in numerous

¹ *Dobson v. Pearce*, 12 N. Y. 156, 165. This is the leading case in New York. It fully establishes the doctrine that an equitable defence may be pleaded as a bar, when no affirmative relief is asked, or could be granted if asked. The *ratio decidendi* was tersely summed up by Johnson J. "The question now is, Ought the plaintiff to recover? and any thing which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance."

² *Pitcher v. Hennessey*, 48 N. Y. 415, 422. In this case the defendant asked and obtained the reformation.

³ *Kelly v. Dee*, 2 N. Y. Sup. Ct. 286. No affirmative relief was asked or grant-

ed, and it would seem that none was possible; the arrangement was oral, and a specific performance by reducing it to writing would have been useless; and there could be no specific performance of the substance of the agreement.

⁴ An answer setting up a mortgage of the land in question, given by the plaintiff or his predecessors, default in payment of the debt secured thereby, and possession of the land by defendant under the mortgage, states a good equitable defence to an action brought to recover possession of the premises. *Harrington v. Fortner*, 58 Mo. 468, 474; *Hubble v. Vaughan*, 42 Mo. 188; *Maxwell v. Campbell*, 45 Ind. 360, 368; *Hammond v. Perry*, 88 Iowa. 217.

forms according to the different circumstances which may arise in the transactions of life and the affairs of business; but they may all be reduced to the same general principle. In some instances the equitable rights have been admitted in a purely defensive character, and in others the judgment has awarded affirmative relief to the defendant. In one case, the plaintiff having proved title in himself by means of a deed from the conceded original owner, the defendant, by way of an equitable bar, alleged that, prior to the plaintiff's conveyance, he had purchased of the said owner several parcels of land, including the one in question, that the deed from such original owner should have contained a description of the premises claimed by the plaintiff, but by mistake it was omitted. This defence was sustained as an equitable bar without an actual reformation of defendant's deed;¹ and in the same manner a mistake in a deed from the plaintiff to the defendant, by which the land in suit was omitted, may be made the basis of an equitable defence without any actual reformation asked or granted.² The title of the plaintiff in another similar action being claimed under a sheriff's deed given in pursuance of a sale on execution against the original owner, the defence was that at the sale the sheriff expressly excepted the parcel of land in question therefrom, that his certificate and deed omitted such exception and included a description of the premises by mistake, and that the owner subsequently conveyed to the defendant. The court, on the defendant's demand, reformed the plaintiff's deed, and admitted the defence.³ In a similar action, where the plaintiff's title was through a sheriff's deed, executed to him as purchaser at an execution sale against the person who was the admitted source of title, the defendant pleaded, as an equitable defence, an equitable mortgage arising prior to the inception of the judgment lien, and his own possession under the same. These facts were held to constitute a good defence without affirmative relief asked or granted.⁴

¹ *Crary v. Goodman*, 12 N. Y. 266, 268. See also *Guedici v. Boots*, 42 Cal. 452, 456.

² *Hoppough v. Strable*, 2 N. Y. Sup. Ct. 664.

³ *Bartlett v. Judd*, 21 N. Y. 200, 203.

⁴ *Chace v. Peck*, 21 N. Y. 581. The court having first decided that the facts alleged constituted the defendant an

equitable mortgagee, so that his possession under it would be a good equitable defence, stated the rule in a very accurate and condensed manner, per Denio J. (p. 586): "But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant *can defeat the action* upon equitable principles; and if, upon the application of these prin-

§ 95. Equitable defences are very frequent in actions brought to recover possession of lands by the vendors against the vendees, when an agreement to convey the land in question has been entered into.¹ As illustrations, the following have been upheld: when the complaint alleged the non-payment of the purchase price at the stipulated time, and a consequent forfeiture, the defence that the time of payment had been extended by an oral agreement, and that a tender had been duly made in compliance with such agreement;² in an action in all respects the same on the part of the plaintiff, the defence that a tender had been made and kept good, the court expressly refusing to grant the affirmative relief of specific performance to the defendant.³ The vendee's right to possession under a contract to convey is a very familiar species of equitable defence to actions brought to recover the land by the vendor.⁴ In an action by the grantee of the vendor, who took with constructive notice of the defendant's interest, the right of the vendee's assignee to possession and to a deed of conveyance is a good equitable defence in bar.⁵ To an action for the foreclosure of a mortgage executed by the defendant to the plaintiff's assignor, the answer alleged a mistake in the instrument in relation to the terms and times of payment, claiming that, when corrected, nothing would be due, and demanded the affirmative relief of a reformation. This remedy was granted by the court, although the mortgagee was not a party to the action.⁶ In pleading an equitable defence, all the facts should be averred which are necessary to the existence of the equitable right. In

ciples, the plaintiff *ought not to be put into possession of the premises, he cannot recover in the action.*" The principle so concisely and clearly enunciated is a complete answer to the reasoning of Mr. Justice Talcott, quoted *supra* in the note to § 91. See *McLane v. White*, 5 Minn. 178; *Richardson v. Bates*, 8 Ohio St. 257, 284.

¹ In *Cavalli v. Allen*, 57 N. Y. 508, 514, it was held that the vendee in possession may set up, as an equitable defence, the same equitable rights which he could have enforced had he brought an action for a specific performance.

² *Cythe v. Fountain*, 51 Barb. 186, 188.

³ *Harris v. Vinyard*, 42 Mo. 568.

⁴ *Petty v. Malier*, 15 B. Mon. 604; *Onson v. Cown*, 22 Wisc. 329. But it is held in Kentucky that in an action for trespass

to lands, brought by a vendor in possession against the vendee, the rights of the latter under his contract do not constitute an equitable defence for the trespass, which was an entry upon the land under a claim of right founded upon the contract; in other words, the contract does not give the vendee a right of *entry*, although it would be an equitable defence to an action brought to recover the land if he was already in possession. *Creager v. Walker*, 7 Bush, 1, 8.

⁵ *Talbert v. Singleton*, 42 Cal. 390, 395, 396; *Cavalli v. Allen*, 57 N. Y. 508.

⁶ *Andrews v. Gillespie*, 47 N. Y. 487, 490. The objection of the want of the mortgagee as a party was expressly taken and as expressly overruled, the court

many instances this right is, from the nature of the case, a right to affirmative remedy; and, whether this remedy is demanded or not, the answer should contain all the substantial facts that would be found in a cross-bill in chancery.¹

§ 96. These defences are not, however, confined to actions involving the title to lands, or those brought upon contracts relating to land; they are proper in actions based upon mercantile agreements, and in all others where an equity may arise and affect the rights of the parties. The complaint in an action upon a promissory note demanded judgment for a certain balance unpaid. A defence that the note was given upon a settlement, and that by mistake the amount was made too large by a certain sum which was more than the unpaid balance claimed by the plaintiff, was held a good equitable bar to the action, without any specific relief demanded or awarded;² and in an action upon a policy of reinsurance the recovery was defeated by the fact, set up in defence, that the same person acted as agent for both the parties in procuring the policy to be issued, and that his agency for the plaintiff was unknown to the defendant at the time.³ Here, also, no affirmative relief was granted; nor could any have been given except cancellation of the policy, which would certainly have been entirely useless. The assignee of a lease bringing an action for the rent, the defendant averred that the assignment to the plaintiff, although absolute in form, was in fact given as collateral

holding that he was not a necessary party in order to a judgment of reformation.

¹ See *Bruck v. Tucker*, 42 Cal. 846, 852, per Wallace J. "It must be considered as settled [in California] that, in interposing such a defence, the defendant becomes an actor, and the defence interposed a pleading in equity, the sufficiency of which, in matter of substance, though not in point of mere form, is to be determined by the application of the rules of pleading observed in courts of equity in cases of like character." Cites, as decisive of this rule, *Estrada v. Murphy*, 19 Cal. 272; *Lestrade v. Barth*, 19 Cal. 660; *Weber v. Marshall*, 19 Cal. 447; *Blum v. Robinson*, 24 Cal. 127; *Downer v. Smith*, 24 Cal. 114. See *Hughes v. Davis*, 40 Cal. 117; *Arguello v. Edinger*, 10 Cal. 160; *Clark v. Huber*, 25 Cal. 693, 697.

² See *Seeley v. Engell*, 18 N. Y. 542, re-

versing s. c. 17 Barb. 530. See *Becker v. Sandusky City Bk.*, 1 Minn. 811.

³ *N. Y. Central Ins. Co. v. Nat. Protection Ins. Co.*, 14 N. Y. 85; 20 Barb. 468. This case was peculiar. The defence established was not averred, but the answer was merely a denial, saying, "They deny that they made and executed a policy of insurance, or delivered the same to the plaintiff, as stated in the said complaint." On the trial the evidence establishing the defence stated in the text was admitted without objection; and the Court of Appeals held that however improper under the answer if objected to, as the plaintiff had failed to object, it could not raise the objection in the Appellate Court. The result was that a defence conceded to be purely equitable was proved under a denial only. See observations of Denio J. quoted in note to § 70.

security for the payment of a note, that the note had been paid, and that the interest of the plaintiff had thereby ended. This defence was sustained, and here, also, no affirmative relief could have been essential to the defendant's security or protection under any circumstances; the judgment in his favor was a bar to all possible further action on the lease by the plaintiff or his assigns.¹ In all the foregoing instances the single equitable defence has been spoken of as though it stood alone, unconnected with any others. An equitable defence, however, may be joined with any other defences, legal or equitable, which may possibly arise in the action. In many of the cases referred to in the text and cited in the notes, other defences were spread upon the record. Thus, in the action upon a policy of insurance any of the customary legal defences of misrepresentations, breach of warranties, non-compliance with provisions of the policy in regard to proofs, and the like, might have been pleaded and proved in connection with the equitable defence which was interposed.²

§ 97. The remaining question to be considered is, When will affirmative equitable relief be granted to the defendant upon the facts which he alleges in his answer as constituting an equitable bar to the plaintiff's recovery? The New York Court of Appeals, in an early case, expressly held that in an action upon a covenant against incumbrances in a deed of lands, brought to recover damages for a breach thereof by means of an outstanding mortgage, the defendant may show, by way of equitable defence in bar, a mistake in the deed by which an exception of that very mortgage was omitted from the covenant, but that he could not have, in that action and upon an answer setting up all these facts, the affirmative relief of reformation. The case was decided, and the judgment sustained, expressly upon this distinction.³ This decision, however, cannot be regarded as correct in the light of other subsequent adjudications made by the same court and referred to in the foregoing paragraphs. Affirmative relief may certainly be given to the defendant upon his answer in all cases where, from the nature of the subject-matter and from the relations of the parties, a specific remedy in his favor is possible according to

¹ *Despard v. Walbridge*, 15 N. Y. 374, 192; *Dorsey v. Reese*, 14 B. Mon. 157; 378; *Struman v. Robb*, 37 Iowa, 311, *Smith v. Moberley*, 15 B. Mon. 70, 73; 313; *Hablitzel v. Latham*, 35 ib. 550. *Bosley v. Mattingley* 14 B. Mon. 89, 91.

² See *Bennett v. Titherington*, 6 Bush,

³ *Haire v. Baker*, 5 N. Y. 357 (18.1).

the doctrines of equity jurisprudence, certainly in all cases where the answer can be considered as setting up a counter-claim. There are undoubtedly instances in which no such relief is possible.¹ Where, however, the nature of the subject-matter and of the relations between himself and the plaintiff are such that he could have maintained an independent suit in equity against the plaintiff and procured specific relief thereby, or could have filed a cross-bill under the old practice, he may now obtain the same remedy upon his answer, at all events, as was before remarked, if the demand alleged in the answer constitutes a valid counter-claim. This is undoubtedly the general rule. In a very few States, however, cross-complaints or petitions are expressly recognized by the codes in addition to counter-claims; and the rule in those States may be that, if the demand for equitable relief do not constitute a proper counter-claim, it must be made in a cross-complaint or cross-petition, and not in an answer. Subsequently to the decision of *Haire v. Baker*,² in New York, the Court of Appeals held, by way of *dictum* in *Dobson v. Pearce*,³ that the defendant may obtain affirmative relief upon the answer which he pleads to the plaintiff's cause of action. Finally, the doctrine was expressly established as the basis of the decision. In an action to recover possession of land, where the plaintiff held his title by a sheriff's deed given upon a sale under execution against the original owner, the defendant not only defeated the recovery by proving a mistake in the sheriff's deed, but obtained a judgment reforming that deed by correcting the mistake.⁴ While in some States the answer may be turned into a cross-petition, and affirm-

¹ The case of *Despard v. Walbridge*, cited *supra*, seems to be such a one. The defendant had a right to prevent a recovery against himself by one who had no interest in the lease; but he certainly could not have enforced a re-assignment of the lease from the plaintiff to his assignor, nor a cancellation of that assignment, because he had no interest in or power over the instrument in question; much less could he have obtained any relief against the lease. His right was purely defensive.

² *Haire v. Baker*, 5 N. Y. 357.

³ *Dobson v. Pearce*, 12 N. Y. 156, 165, per Allen J.

⁴ *Bartlett v. Judd*, 21 N. Y. 200, 208.

On the trial the complaint was dismissed, but the remedy of reformation was denied. The General Term, on appeal, modified this judgment by granting the additional relief of reformation. This latter ruling was affirmed by the Court of Appeals. Bacon J., after stating the relief which would have been granted in equity under the former system, added: "But this resort is no longer necessary, since by our present system an equitable defence may be interposed as well in an action of ejectment as in any other form of proceeding, and the defendant may also claim in the same action any affirmative relief to which he shows himself to be entitled."

ative relief obtained,¹ yet this proceeding does not seem to be necessary, even in those States where the practice provides for such cross-petition or cross-complaint; the defendant may have the proper affirmative relief to which he is entitled upon his answer.² In Missouri, however, it would seem that affirmative equitable relief can never be granted to the defendant upon his mere answer.³ In extreme contrast with this position is the doctrine, already discussed, which refuses to the defendant the benefit of an equitable defence as a bar to a legal cause of action, unless the facts relied upon are such that he would be awarded an affirmative remedy if he elected to demand a judgment conferring it.⁴ The general subject of affirmative relief to defendants will be treated more at large in the subsequent sections upon "Counter-claim" and "Union of Defences in One Answer."

SECTION FIFTH.

A LEGAL REMEDY OBTAINED UPON AN EQUITABLE OWNERSHIP OR EQUITABLE PRIMARY RIGHT.

§ 98. A special case, arising from the general union of legal and equitable forms produced by the new system, requires a particular examination. It may be properly presented under the form of the question whether the holder or possessor of a purely equitable primary right, or the owner of a purely equitable estate or interest, can maintain an action to recover a remedy which, before the change in procedure, was purely legal; or, to express the same thought in terms not entirely accurate, but which are, nevertheless, in constant use, whether such holder of a purely

¹ *Massie v. Stradford*, 17 Ohio St. 596. This was an action for trespass to lands. The defendant, in an answer by way of cross-petition, set up an equitable title to the premises in question, and prayed for a decree establishing the legal title in himself, and an injunction against the plaintiff's further prosecution of the action at law. *Hablitzel v. Latham*, 85 Iowa, 550; *Hammond v. Perry*, 88 ib. 217.

² *Klonne v. Bradstreet*, 7 Ohio St. 322.

³ *Harris v. Vinyard*, 42 Mo. 568. This was an action to recover lands. The defendant set up a contract of purchase

from the plaintiff's deceased father, payment of the purchase price, and prayed a specific performance. This judgment was rendered by the court at the trial, and certainly there could be no simpler nor stronger case for equitable relief to the defendant than that of the vendee of land who is in possession, and has paid the purchase price. The Supreme Court, however, while sustaining the defence as a bar, refused any affirmative remedy. See *State v. Meagher*, 44 Mo. 356.

⁴ See *supra*, § 91.

equitable primary right, or owner of a purely equitable estate or interest, can maintain upon it an action at law to recover an ordinary legal judgment, either for possession or for damages; to put the same question in a concrete form by limiting it to a particular class of rights and remedies, whether the owner of an equitable estate in land can maintain an action analogous to ejectment? The action of ejectment was originally invented to enable a tenant for years to recover possession of the demised premises during the term, the ancient real actions being confined to freehold estates. It was, during its existence and use as a strict common-law instrument, a possessory action; and a judgment rendered in it never determined the question of title. Its use in trying titles was wholly a matter of convenience: no rule of the common law made it a means of settling a disputed controversy as to title. Nothing but the voluntary acquiescence of the defeated party enabled it to produce even the semblance of such a result. Action after action might be brought, and the common law placed no obstacle in the way of such a succession of attacks. Equity alone devised the cumbrous method of an injunction suit to restrain the further prosecution, and to quiet the title of the party who had succeeded in several trials at law. Since the common law paid the most rigid adherence to external forms, it is true that the action of ejectment, until changed by statute, was never used except for the recovery of demised premises; and this form was preserved in the absurd fiction of making John Doe, as tenant of the real claimant, the plaintiff on the record. As the estate for years, to protect which the action was originally invented, was a legal estate, the rule grew up, and was followed without exception, and from the very necessities of its form, that the action of ejectment could only be employed as a means of recovering possession of a legal estate. The common law undoubtedly knew no such thing as ejectment by the owner of an equitable estate, or the holder of an equitable title; such estate or title could only be protected by a court of equity.

§ 99. This rule, however, was always a matter of mere external form; it was one of the formal incidents of the action, as arbitrary and technical as the fiction of the plaintiff's being a lessee. When the statute abolished all the distinctions between actions at law and suits in equity and between the forms of such actions, one might naturally have supposed that the formal rule

thus described would have been at once abandoned. On the contrary, the courts of certain States, in which the new procedure has been adopted, continue to speak of actions of ejectment as though they were existing and fully recognized judicial instruments, with all their ancient and arbitrary incidents and requirements; as though, in fact, there had been no great change sweeping away the very foundations of the ancient system. It is true, this reform legislation has not altered any primary rights nor final remedies; an equitable right or estate is not turned into a legal right or estate; and the remedies of pecuniary compensation and of possession of lands or chattels which were called legal because they could only be obtained by actions at law, and the other specific kinds of relief which were called equitable because they could only be obtained by suits in equity, are left unaffected. One great change, however, has taken place which some courts seem at times to have forgotten; all these remedies are now to be obtained by a single civil action, which it is neither appropriate to call legal nor equitable, because the distinctions between legal and equitable actions have been destroyed. It may be well enough, in order to avoid circumlocution, to describe one class of remedies as legal and another as equitable, if it be constantly remembered that this nomenclature no longer depends upon the kind of action used in the pursuit of these remedies, and that they are all pursued and obtained by means of one action which has no distinctive and peculiar features depending upon the species of remedy granted through its instrumentality.

§ 100. Assuming these elementary doctrines of the new system of procedure, I am enabled, by applying them, to answer the proposed question upon principle; I shall then compare the results thus obtained with the rules laid down by judicial decision. It must be conceded at the outset that every primary right, whether legal or equitable, when invaded, should have a remedy or remedies appropriate to its nature and extent. When the right is possessory, there should be a remedy which restores possession; when the right involves the ownership or title, there should be a remedy which establishes the ownership or title, or which restores the owner to his full dominion by removing obstructions to or clouds upon his title. The law gives these classes of remedies; and the confusion into which some of the courts have fallen in reference to this subject results from a failure to distin-

guish between these two kinds of primary rights, and the two corresponding kinds of remedies; from an utter confounding of possessory rights with rights of ownership, and possessory remedies with remedies going to the ownership. Now, it cannot be doubted that where the question is concerning ownership, where the primary right invaded is one of ownership or title, and the remedy sought is correlative thereto, the equitable right must have an equitable remedy. If a person is clothed with an equitable title or ownership, from the very nature of the case his remedy must be equitable, because the positive relief which he needs in almost all cases is the conversion of this equitable ownership or title into a legal one, which can only be done by a remedy within the competency of equity tribunals, — by a specific performance, a reformation, a re-execution, a cancellation, and the like. The only exception to the kind of relief described — the turning the equitable title into a legal one — is the remedy of injunction, which is often necessary, and which does not change the nature of the title, but leaves it as it was. When, therefore, the object of the action and of the remedy demanded relates to ownership or title, unquestionably the equitable title must be judicially protected and aided by a remedy that is purely equitable, and cannot be thus protected and aided by a remedy which is in form legal.

§ 101. This, however, is not true when the right is possessory, and the remedy demanded is a mere transfer or restoration of possession. There are equitable primary rights, titles, and ownerships which entitle the holder thereof to the undisturbed possession of the land which is the subject-matter of the right or title. This proposition cannot be denied. A large part of the remedies once given by the Court of Chancery alone, and the whole range of equitable defences now allowed in legal actions, are based upon the conception that the equitable owner is entitled to possession as a part of his right. To deny this is to turn many of the familiar rules of the law into absurdity, and to render much of the relief given by the courts *se f*-contradictory. When the vendor under a land contract sues the vendee in possession to recover the premises, and the latter interposes his equitable right as a defence, and succeeds in defeating the action brought against him, that success is entirely due to the fact that he is entitled to the possession by virtue of his equitable title. Now, what the

law permits to be done *defensively*, for the same reason, and by the application of the same principle, it should permit to be done *affirmatively*. There is no distinction in principle between the two cases. It is simply absurd to say that a person in possession under an equitable title may defend and be kept in his possession by exhibiting that title in a legal action, but that, if he is out of possession, he shall not be allowed to recover his rightful possession by exhibiting his title in the same kind of action. In fact, when the courts, with almost perfect unanimity, decided that the equitable owner may rely on his title as an absolute bar—a merely negative defence—to the so-called action of ejectment brought against him, they decided in principle that he may obtain possession in the like action. Whenever, therefore, a person clothed with an equitable title or ownership which by its nature entitles him to the immediate possession of the land, as against the party actually in possession, and he desires simply to obtain the possession, there is nothing in principle which can forbid him to maintain an action for that purpose, and recover the possession. To call such an action “legal” is no answer; for the rule which forbade an equitable right or title to be enforced or even recognized in a court of law was a mere arbitrary matter of form, and has been expressly abolished. To call the action “ejectment” is no answer, because there is no such action, and all the technical rules which prevailed in respect to it at the common law have been swept away by the legislative command. The courts which now speak of “ejectment” as an existing species of action, and which apply its rules to an action now brought to recover possession of land, are so far disregarding the express terms of the statute, and thwarting its plainest design. It is true that all equitable ownerships and titles do not carry with them the right of immediate possession of the land, and this argument is carefully limited to those which do involve this element in their proper nature. It might seldom happen that the equitable owner would be satisfied with a mere possessory remedy, but there are circumstances and situations in which, and parties against whom, such remedy may be very important, and may perhaps be the only one practicable. To illustrate by the most familiar and plain example, that of a vendee under a contract to convey land. Assume such an agreement completely fulfilled by the vendee. He is the equitable owner, and entitled

to possession as against the vendor, and therefore as against all the world. Beyond a doubt, as against the vendor, this equitable owner would prefer to bring an action to obtain a specific performance, and thus at one blow to consummate his title and remove all obstacles to the full enjoyment of his ownership ; but, if he chooses to ask for a part instead of the whole, upon what grounds of principle, upon what reasons of policy, shall the courts refuse to award him the possession by compelling the vendor, who wrongfully withholds, to surrender it up ? To say that the vendor has the legal title is no answer, and is a mere arguing in a circle, because the action and the remedy do not concern the title, and by the conceded rules of the law his legal title does not enable the vendor to retain possession from the vendee. If, however, a third person without color of right, and not the vendor, withholds the possession, the reasons in favor of the vendee's maintaining the action are still stronger. Is it answered that in ejectment the defendant may succeed by proving legal title out of the plaintiff, because the plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendant's ? This, again, is a mere formula of words without any real meaning. There is no action of ejectment. The action supposed to have been brought is simply one to recover the possession to which the plaintiff is entitled from a defendant who has no right or color thereof ; and at best the rule invoked is the arbitrary result of external and technical forms clustered about the common-law action, all of which have been swept out of existence with the action itself. Unless, therefore, it is established that the common-law form of action called "ejectment," with all of its incidents, still remains in full force and effect, notwithstanding the peremptory provisions of the statute which have in terms abrogated them, I have demonstrated that there is no reason or ground in principle for refusing to permit the owner of an equitable estate, which entitles him to immediate possession, to maintain an action for the purpose of recovering that possession. We may call the action legal or equitable, and it makes no difference. The sum of the whole matter is, a person is clothed with a right over land which by its essential nature confers upon him the right of immediate possession ; he should be, and on principle is, permitted to enforce that right and obtain possession, if that remedy is all he demands, even though he might, if he

chose, avail himself of a higher and more efficient remedy. The same course of argument applies with equal force to rights over chattels as well as over lands, wherever there can be an equitable ownership of chattels.

§ 102. I have now to compare the result of a discussion of the question upon principle with the doctrine which is established upon the authority of decisions thus far made; and I concede at the outset that in numbers the judicial decisions are decidedly opposed to my conclusions. In accordance with its general theory, that a distinction between legal and equitable actions is still preserved, the Supreme Court of Missouri has held, in a long series of cases, that the owner of an equitable title can under no circumstances obtain legal relief, but shall be driven to two actions,—the first to turn the equitable into a legal estate, and the second to obtain possession.¹ The same doctrine has been established in Wisconsin, and has been extended to waste, on the ground that the actions of ejectment and waste must be brought by one having the legal ownership, and that he must recover on the strength of his own title.² It would seem that the same rule had been adopted in Indiana, although this is by no means certain. A series of cases have held that a plaintiff, *alleging a legal ownership and right of possession*, cannot recover upon proof of an equitable ownership; that an action to recover possession of lands, where the pleading contains such averments, is analogous to the common-law ejectment, and the plaintiff “must recover on a legal title, and not on an equitable title.”³ In California the

¹ *Reed v. Robertson*, 45 Mo. 580, and cases cited in the note to § 79. See, however, *Henderson v. Dickey*, 50 Mo. 161. In *Reed v. Robertson* the defendant was a trustee, and held the legal title in trust to convey the same to the plaintiff. It was adjudged that the plaintiff could not maintain a simple action for possession,—called by the court ejectment,—but must resort to a suit in equity to compel a performance of his trust by the defendant. The other case cited shows that the court of Missouri has modified its views in relation to relief of possession accompanying other specific equitable relief, but goes no farther. See *supra*, § 79, n.

² *Eaton v. Smith*, 19 Wisc. 587; *Gillett v. Treganza*, 18 Wisc. 472, 475. The latter case was an action to recover posses-

sion and damages for waste, the complaint disclosing an equitable title in the plaintiff. Dixon C. J. said: “The actions of ejectment and waste, being legal remedies, must be brought by the person legally interested in the property, and cannot be maintained by a *cestui que trust*, or other party having only an equitable interest.” Citing 1 Chitty’s Pleadings, 60, 289, 290. One might have supposed that the code of procedure had somewhat lessened the authority of Chitty’s Pleadings in regard to the forms of actions in that State.

³ *Groves v. Marks*, 32 Ind. 319; *Rowe v. Beckett*, 30 Ind. 164; *Stehman v. Crull*, 26 Ind. 486. In *Groves v. Marks* the action was called ejectment. The complaint alleged that the plaintiff was owner in fee-simple, and entitled to possession.

doctrine is established in the most general form, that the holder of an equitable title cannot maintain an action to recover the possession, because, in the language of the courts, "in ejectment the legal title must prevail;"¹ and a like rule seems to prevail in Iowa.²

§ 103. In New York there is a conflict of opinion, as shown by the reported cases. The Supreme Court has held, in accordance with the doctrine laid down in Missouri, Wisconsin, and California, that the holder of an equitable title cannot recover possession, even against a mere intruder, but that he must first procure his equitable to be changed into a legal ownership by the judgment rendered in an equity action, and thus put himself in a condition to maintain ejectment.³ The Court of Appeals in New York has reached a conclusion directly the contrary in a case where the facts and the form of the proceeding made the decision necessary and final. The ruling was, therefore, not a *dictum*, but was the very *ratio decidendi*, and involved a *principle* which fully sustains the reasoning and doctrine of the text, although the

On the trial it appeared that the plaintiff was a vendee under a land contract. Gregory J. said (p. 320): "It is claimed that the plaintiff could recover in this form of action on an equitable title. We gave the question a careful consideration in *Rowe v. Bennett*; and the conclusion there arrived at is perfectly satisfactory to our minds. In an action under the code for the recovery of real property on a complaint averring the *legal* right of the plaintiff to the possession, he must recover on a legal and not on an equitable title." *Rowe v. Bennett* presented exactly the same facts, and the court placed the decision upon exactly the same grounds. *Stehman v. Crull* was also a case of the same nature, and the court said: "The action to recover possession of real property under the code, where the complaint is on the legal title, takes the place of the old action of ejectment; and the plaintiff must show a legal title to the possession before he can recover." The case was there put on the ground that there was a complete failure of proof, and not a mere variance. These decisions do not establish a doctrine necessarily opposed to that which is advocated on principle in the text; they do not pass upon the effect of an action in

which the complaint discloses an equitable title, and demands possession.

¹ *Emeric v. Penniman*, 26 Cal. 119, 124; *Clark v. Lockwood*, 21 Cal. 222. See *Hartley v. Brown*, 46 Cal. 201; *Buhne v. Chism*, 48 Cal. 467, 472; also *Morton v. Green*, 2 Neb. 441.

² *Walker v. Kynett*, 32 Iowa, 524, 526, per Beck J.: "It cannot be claimed that in an action at law lands may be recovered against one holding the legal title on the ground that his title is based on fraud. One holding such a title may successfully plead it against the equitable claim of another attempted to be enforced at law. In order to defeat a fraudulent title, it must be attacked in chancery, and in that *forum* declared void. A person holding the equitable title, in order to recover must cause the adverse legal title to be declared void." But see *Brown v. Freed*, 43 Ind. 253, 254-257.

³ *Peck v. Newton*, 46 Barb. 173. The plaintiff's title was equitable, in substance that of a vendee. The defendant, so far as the case shows, was without color of right. The complaint merely demanded possession. See opinion of Parker J. in note to § 68.

case did not in form present the naked question under discussion. A plaintiff who had only an equitable title was permitted to recover a judgment for possession, based upon a verdict, where no other relief was granted, against a defendant who held the legal title under a deed regular on its face. This decision goes to the full length of the doctrine which I have advocated ; for, although the complaint demanded the specific equitable relief of cancellation and reconveyance as well as possession, yet on the trial, which was had before a jury, and was conducted in all respects like the trial of a legal action, these demands for relief were entirely ignored ; the single question of the plaintiff's right to possession was submitted to the jury, and upon their verdict a judgment for possession was rendered, which was affirmed by the tribunal of last resort.¹ In Kansas, under an express provision of the code, the holder of an equitable title may maintain an action to recover possession of the land.²

§ 104. There is another class of actions which have been admitted by some courts as a consequence of the reform legislation, which could not have been maintained prior to the change. It was a familiar doctrine that one partner could not maintain an action at law against a copartner to recover any sum which was a portion of the firm assets, or to recover any sum claimed to be due by virtue of their common partnership dealing or joint undertakings, unless there had been prior to the suit an account stated and a balance agreed upon between them, or unless the defendant had expressly promised to pay the sum sought to be recovered. In other words, the plaintiff in his declaration was obliged to aver either the accounting together and the balance struck, or the express promise. If he did not, he would be either nonsuited at the trial

¹ *Phillips v. Gorham*, 17 N. Y. 270. The complaint alleged the equitable title in the plaintiff. The question was presented in the sharpest manner on the trial by the requests made on the part of the defendant and by the charge of the court. The defendant asked the court to charge that the plaintiff was not entitled to a verdict, that he should have procured a judgment declaring the defendant's deed void, and then brought an action for the possession. The court refused this request, and instructed the jury that the plaintiff could recover in this action if the facts averred by him were found to

be true. Although the Court of Appeals does not in its opinion discuss the question in the form now presented by me in the text, its decision, as it seems to me, necessarily involves that question, and answers it in the most explicit manner. If the complaint had not contained the prayer for equitable relief, which was disregarded, the question would have been the same in form with that under consideration. Also, *Murray v. Blackledge*, 71 N. C. 492.

² *Kansas Pac. R. R. v. McBratney*, 12 Kans. 9.

or his pleading would be held insufficient on demurrer. If there had been no such account stated or express promise, his only remedy was by an action in equity for an accounting; and, having obtained jurisdiction of the matter, the Court of Chancery would decree payment of the amount due. This doctrine is too familiar to require the citation of authorities in its support. The Supreme Court of Indiana has held that this rule is abrogated by the code of procedure, and that a partner may maintain an action to recover a sum due from his copartner, by reason of their joint business, without averring or proving any settlement or express promise.¹ The same doctrine has been applied in Missouri to owners in common generally who are not partners.² The old rule is retained, however, in most of the States; and an action by a partner to recover a sum of money from his copartner, alleged to have become due by reason of their joint undertakings, is not permitted, unless based upon a mutual settlement or an express promise. It is so held in California,³ and in New York,⁴ and in other States;⁵ and this is beyond doubt the correct interpretation of the codes. The contrast between this case and the one previously discussed is plain; and an analysis of these contrasting features will do much toward elucidating the general principles which regulate the union of legal and equitable actions and remedies. When a person has an equitable ownership of land of a kind which entitles him to immediate possession, his *remedial* right to possession is in exact conformity with his primary right of ownership. The denial of this remedy of simple possession under the former system was based solely upon technical and arbitrary notions incidental to the mere external forms of actions and modes of adjudication which prevailed in the two classes of courts; and when these external forms, with their incidents, were

¹ *Heavilon v. Heavilon*, 29 Ind. 509; *Shalter v. Caldwell*, 27 Ind. 376; *Duck v. Abbott*, 24 Ind. 349. The last case is directly in point; for the complaint alleged the partnership, and sought to recover the plaintiff's share in the proceeds. See also *Jemison v. Walsh*, 30 Ind. 167. But, *per contra*, *Briggs v. Daugherty*, 48 Ind. 247, 249, seems to abandon this position.

² *Rogers v. Penniston*, 16 Mo. 432, 435.

³ *Russell v. Byron*, 2 Cal. 86; *Buckley v. Carlisle*, 2 Cal. 420; *Stone v. Fouse*, 8 Cal. 292; *Barnstead v. Empire Mining*

Co., 5 Cal. 299; *Ross v. Cornell*, 45 Cal. 133; *Pico v. Cuyas*, 47 Cal. 174, 179.

⁴ *Emery v. Pease*, 20 N. Y. 62.

⁵ *Wood v. Cullen*, 13 Minn. 394, 397; *Lower v. Denton*, 9 Wisc. 268; *Shields v. Fuller*, 4 Wisc. 102; *Smith v. Smith*, 33 Mo. 557; *M'Knight v. M'Cutchten*, 27 Mo. 436; *Springer v. Cabell*, 10 Mo. 640. But see, for examples where an action may be maintained, *Whitehill v. Shickle*, 43 Mo. 537; *Seaman v. Johnson*, 46 Mo. 111; *Russell v. Grimes*, 46 Mo. 410; *Buckner v. Ries*, 34 Mo. 357.

removed, a way was opened for redressing the primary equitable right in a manner exactly conforming with its own nature and extent; that is, a primary equitable right or interest calling for possession can be redressed by granting possession. In other words, the ancient rule denying to an equitable owner the remedy of bare possession in the cases described was one of the "distinctions" and "forms" in express terms abolished by the legislature in enacting the new procedure. Courts which continue the denial because "ejectment could not be brought by a holder of an equitable title," or because "the legal title must prevail," overlook the real nature both of the right to be redressed and of the remedy to be conferred, and pay a regard only to the technical notions of form which hampered the common-law courts in all their movements, and which became at last so grievous a restraint upon the administration of justice that the legislature was compelled to intervene. In the other case, however, the reasons of the rule were very different, and were founded upon the nature of the primary right itself, and not upon any formal incidents of the judicial proceeding by which it was redressed. A partner is not suffered to maintain the action in question because his primary right, flowing from the fact of partnership, is not of such a nature as to call for a remedy of that kind; that is, a judgment for the payment of a certain sum. The right to the recovery of a certain sum of money, unless arising from tort, must, according to the common-law, be based upon a promise express or implied. It does not affect this principle to say that the common-law doctrine of implied promises was itself largely founded upon a fiction. Granting this to be true, as it undoubtedly was, still the theory was firmly established that the liability spoken of arose either from an express promise or from acts, events, or relations which created a duty to pay, and which duty the law conceived of as springing from an implied promise. If we discard the notion of an implied promise, therefore, as fictitious, there must still be a relation existing between the parties, from which the duty takes its origin; and without the existence of such a relation there was no duty on the one side, and no primary right on the other. Now, it was an elementary doctrine of the law pertaining to partnership that, resulting from their mutual dealings with their joint assets, no promise is ever implied that one partner shall pay to the other any definite sum as the

amount due from the proceeds of the undertaking, or as his share of the joint assets. No promise is ever implied from the existence of this relation, from the mere fact of there being a joint business, joint profits, or joint property. Or, to express the same doctrine without the use of fictitious terms, from the relation of Partnership and the joint undertakings and assets thereof, the Law imposed no duty upon one partner to pay to the other any definite sum in respect of his share therein, and gave no corresponding primary right to that other to demand such payment. If, however, there has been an accounting, so that a balance in favor of one is ascertained, a promise is implied on the part of the other — or a duty arises on his part — to pay that sum. The right to maintain the action by one partner against another, and to recover a definite sum, depended therefore, and still depends, not upon anything connected with the form of the action, or upon the distinctions between legal and equitable actions, but upon the very nature of the primary right. Those courts which have held that, under the new procedure, a partner may recover a definite sum from a copartner without an accounting and without an express promise, have in effect decided that the new procedure has materially changed the primary rights of parties, has, in this instance, created a primary right which did not before exist at all, which is a conclusion in direct antagonism with the plainest and best-settled principles of interpretation. In fact, this primary right of a partner against his fellow has not been modified by the reform in the modes of procedure; and under the new system, as under the old, there should be no recovery of a definite sum in any action, unless the facts which create the primary right have occurred, — unless there has been or is an accounting and balance ascertained, or an express promise to pay the sum. It is not the case of an equitable primary right being supported by a legal remedy, because the equitable primary right of the partner does not involve the payment of a certain sum; its only remedy is an accounting, and this is preserved in full force and effect. The analysis above given may not be very important in itself; but it will aid in distinguishing primary from remedial rights, and the substances of rights which have not been changed from the formal incidents which have been abolished; it will enable us to determine the exact limits of the modifications made by the reform legislation.

§ 105. A few instances of other actions will bring this inquiry to an end.¹ It has been held in Nevada that a person claiming to be tenant in common with others of land may maintain an action for partition, whether his title be legal or equitable.² On the other hand, the Supreme Court of Missouri has decided that the owner of chattels by an equitable title cannot recover damages for their conversion in an action analogous to trover.³

§ 106. I have thus dwelt at length upon the particular case of combining legal and equitable rights and remedies which forms the subject of the present section, because more than any other it involves and expresses the true intent and design of the new system; it is the crucial test of the manner in which the spirit of the reform is accepted by the courts. Probably nothing connected with the practical administration of justice could be more startling to the lawyer of the old school than the suggestion that the owner of a purely equitable estate in lands should be able to bring an action of ejectment to recover possession of the premises; it would be opposed to all his conceptions of law and of equity and of the uses of actions and courts. And yet these conceptions were plainly artificial and arbitrary, and the familiar rules as to the employment of actions as plainly had no foundation in the nature of things, but rested upon words alone. The final object of the reformed American system was to sweep away all of these technicalities, and to allow every primary right to be maintained and every remedial right enforced in the same manner and by a single judicial instrument, untrammelled by the restrictions and limitations which made the practical administration of justice in England and in the United States seem so absurd to the cultivated jurists of Europe. That the numerical weight of authority is at present opposed to my views in relation to the particular matter in question, I fully concede. I believe, however, that in time the influence of an education in the technicalities of the common-law system will cease to be felt on the bench and among the members of the bar, and that the practical rules of procedure in all the States will be brought into a perfect harmony with the letter and the spirit of the reformatory legislation.

¹ That an action brought to recover a money judgment alone may be equitable, and based upon purely equitable rights, see *Rindge v. Baker*, 57 N. Y. 209, 219.

² *Crosier v. McLaughlin*, 1 Nev. 348.
³ *Walker's Adm'rs. v. Walker*, 25 Mo. 367. *S. P. Johannesson v. Borschenius*, 35 Wisc. 181, 184.

SECTION SIXTH.

THE NATURE OF CIVIL ACTIONS AND THE ESSENTIAL DIFFERENCES BETWEEN THEM.

§ 107. Notwithstanding the sweeping language of the codes and practice acts which abolishes all distinctions between the forms of actions heretofore existing, many judges in construing the provisions have declared in most emphatic terms that the change is confined to the external forms alone of actions at law, and that in their essential features certain distinctions and peculiar elements remain which cannot be removed by legislation. This statement is to a certain extent true, if it be confined to what is really the substance of each action, and is not extended so as to include many incidents which, although appearing to be substantial, are really the results of arbitrary conceptions relating to the form; for example, the old rule discussed in the preceding section, which confined the action of ejectment to the recovery of possession of lands in which the plaintiff had a legal estate. If this doctrine, however, is carefully examined, and the examples and authorities in its support are closely analyzed, it will be found that all the unchangeable features and elements which are said to inhere in different actions, and which cannot be reduced to an identity, pertain to the primary rights sought to be maintained by their means, to the delicts or wrongs by which these rights are invaded, to the remedial rights which thereupon accrue to the injured party, and to the remedies themselves which are the final objects of the judicial proceeding. These features and elements in actions are indeed different, and the difference between them the new system does not propose to abolish nor change. The doctrine itself is, therefore, no more than the statement in another form of the conceded fact that the reformed procedure has not affected the primary rights or the remedies which the municipal law creates and confers.

§ 108. As all actions are brought to maintain some primary right invaded by a wrong, and as they result in some one of the many kinds of remedies prescribed by the law, and as in each action the facts from which the primary right arises, and the facts which constitute the wrong, must be stated, and as the

plaintiff must demand and seek to obtain some remedy appropriate to the right and the delict, it follows, as a necessary consequence, that the actions, although constructed and carried on according to the one uniform principle of alleging the facts as they actually are and praying for the relief legally proper, must differ in their substance, because the rights, the delicts, and the remedies differ. This necessary feature of civil actions under the codes has been dwelt upon and explained in numerous cases, some of which are cited in the note.¹ This doctrine was very clearly stated in a

¹ *Goulet v. Asseler*, 22 N. Y. 225, 227, 228, per Selden J.; *Eldridge v. Adams*, 54 Barb. 417, 419, per James J.; *Hord v. Chandler*, 13 B. Mon. 403; *Hill v. Barrett*, 14 B. Mon. 83, 85, per Marshall J.; *Payne v. Treadwell*, 16 Cal. 220, 243, per Field C. J.; *Lubert v. Chauviteau*, 3 Cal. 458, 462, per Wells J.; *Jones v. Steamship Cortes*, 17 Cal. 487, 497, per Cope J.; *Sampson v. Shaeffer*, 8 Cal. 196, 205, per Wells J.; *Miller v. Van Tassel*, 24 Cal. 458, 463, per Rhodes J.; *Richmond, &c. T. Co. v. Rogers*, 7 Bush, 582, 585; *Howland v. Needham*, 10 Wisc. 495. One of the most elaborate of these judicial *dicta* is that of Mr. Justice Selden in *Goulet v. Asseler*; and, although I dissent from his conclusions as a whole, I quote it in full as an able exposition of a certain class of opinions. He says (p. 227): "It can hardly be claimed that prior to the code an action of trespass or of trover could have been maintained, either against the officer or the plaintiff in the execution under the circumstances here disclosed. If any action would have lain before the code, it could only have been an action founded on the special circumstances of the case, setting forth the injury to the contingent interest of the plaintiff in the property, and claiming damages for such injury." He states that in "trespass" or "trover" a plaintiff must show that he had either the actual possession or the right to the possession at the time of the alleged taking or conversion, and in such case the value of the property was the measure of damages; while in the "action on the case" he must prove his damages, and could recover only what he had actually sustained, and proceeds (p. 228): "Although the code has abolished all distinctions between the mere forms of

action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or principle, as an action to recover for the consequential injury resulting from the improper interference with the property of another in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof is therefore required in each of these two kinds of action as before the code, and the same rule of damages applies. Hence in an action in which the plaintiff establishes a right to recover upon the ground that the defendant has wrongfully converted property, to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages is still the value of the property." This rule, in respect to the measure of damages, is undoubtedly correct; but the substantial features, which the learned judge declares remain unaltered, are simply the primary rights of the plaintiff and the wrongs thereto done by the defendant. In the example which he gives the difference which he points out is nothing more nor less than the difference between these rights and the delicts by which they are invaded. These of course cannot be changed by legislation; but these do not constitute the action; they are the facts upon which the action is based. The whole tenor of the quotation implies a greater resemblance between the external forms of the civil action

Recent case as follows: "Although all forms of action were abolished by the code, the principles by which the different forms of action were governed still remain, and now, as much as formerly, control in determining the rights of the parties. In pleading, a party is now to state the facts on which he relies to sustain a recovery; and, if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of the law warrant, without regard to the name or the form of his action."¹ This judge would, however, have expressed his meaning more accurately if he had said, "The principles by which the different actions were governed still control," instead of "The

under the code and of those in use prior to the code than actually exists. In marked contrast with this citation from Mr. Justice Selden, I quote the language of Field C. J. in *Payne v. Treadwell*, 16 Cal. 220. The action was brought to recover possession of land. The complaint alleged "that the plaintiffs are owners in fee as tenants in common, and have the lawful right and are entitled to the possession" of the described premises, and "that said defendants wrongfully entered upon and are now in the wrongful possession of said premises, and wrongfully withhold the possession thereof from the plaintiff." The judgment demanded was possession and damages. The judge said (p. 248): "It is usual to speak of the action to recover possession of real property as the action of ejectment, and it is possible that with the technical designation it is sometimes thought that some of the technical allegations peculiar to the old form of the action are still necessary. But such is not the case. There is but one form of civil action in this State, and all the forms of pleading and the rules by which their sufficiency is to be determined are prescribed by the Practice Act. The system in this State requires the facts to be alleged as they exist, and repudiates all fictions. And only such facts need be alleged as are required to be proved, except to negative the possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent. Now what facts must be proved to recover in ejectment? These only: that the plaintiff is seized of

the premises, or of some estate therein, in fee, for life or for years, and that the defendant was in possession at the commencement of the action. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyance from a paramount source of title or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends; and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them." The doctrine which Mr. Justice Field thus applies to the single action is clearly applicable to all kinds of actions, legal or equitable; and it is the common principle which renders the civil action under the new system a unit in respect of external form, no matter how much diversity there may be in the primary rights, delicts, and remedies. This sound principle was accurately stated by Mr. Justice Cope in *Jones v. Steamship Cortes*, 17 Cal. 487, 497: "We have but one form, and nothing more is required than a statement of the facts relied upon for a recovery. The statute makes no distinction in matter of form between actions of contract and those of tort; and relief is administered without reference to the technical and artificial rules of the common law upon the subject." In *Miller v. Van Tassel*, 24 Cal. 458, 468, Rhodes J. said: "The forms only of the several actions have been abolished; the substantial allegations of the complaint in a given case must be the same under our Practice Act as were required at the common law."

¹ *Eldridge v. Adams*, 54 Barb. 417, 419, per James J.

principles by which the different *forms of action* were governed still control." The true effect of the reform was well stated by the Court of Appeals of Kentucky in the following extract: "The code makes no change in the law which determines what facts constitute a cause of action, except that, by reducing all forms of action to the single one by petition, it changes the question whether the plaintiff's statement of his cause shows facts constituting a cause of action in "trespass," or "assumpsit," or other particular form, into the more general question whether it shows facts which constitute a cause of action at all; that is, whether the facts stated are sufficient to show a right in the plaintiff, an injury to that right by the defendant, and consequent damage. What facts do in this sense establish a cause of action is determined by the general rules or principles of law respecting rights and wrongs, and by a long course of adjudication and practice applying these rules to particular actions under the long established rule of pleading, that the declaration must state the facts which constitute the plaintiff's cause of action. . . . The code does not authorize a recovery upon a statement of facts which did not constitute a cause of action in *some* form before the code was adopted. And, therefore, the former precedents and rules and adjudications may now be resorted to as authoritative, except so far as they relate to the distinctions between the different forms of action, or to merely formal or technical allegations."¹ To this clear and accurate exposition I can add nothing which will increase its efficacy as the enunciation of the general principle. The final effect produced by the reform legislation in abolishing all distinctions between actions may be expressed in the following manner: No inquiry is now to be made whether the action is "trespass," or "trover," or "assumpsit," or any other of the ancient common-law forms, nor, except

¹ *Hill v. Barrett*, 14 B. Mon. 83, 85, per Marshall J. In the very recent case of *Richmond, &c., T. Co. v. Rogers*, 7 Bush, 532, 535, the court used the following language: "The code makes no change in the law which determines what facts constitute a cause of action. Forms have been abolished; but the substance of the common-law rules of legal procedure remains, except where they conflict with the spirit of our statutory regulations

upon the subject of pleading and practice." There is really no conflict between these two modes of statement made by the Kentucky court. The broad generality of the latter quotation is limited by the exception which the court adds, and without which the rule as laid down would be plainly erroneous. See *Johannesson v. Borschenius*, 35 Wisc. 181, 135; *Haughton v. Newberry*, 69 N. C. 456, 459-461.

for the single purpose of determining the proper tribunal for its trial, whether it is legal or equitable ; all these forms and classes are utterly abrogated. For this reason, the various rules which pertained to each of these common-law forms of action, which distinguished one from the other, which determined the peculiar nature and object of each, and which regulated the proceedings in each, are no longer to be invoked. It is simply an abuse of language to say that the ancient forms of action have been abolished, and that any of the rules which were based upon the existence of these forms, and had no relevancy except in connection therewith, are retained. [The only question is, Would the facts stated have enabled the plaintiff to maintain any of the common-law actions or a suit in equity? This is, however, identical with the rule already given, that the primary rights created by the law, and the wrongs committed against them, and the remedial rights resulting from such wrongs, are unaffected by the legislation which only aims at a reform in the procedure.]

§ 109. The general doctrine thus reached may be properly illustrated by one or two examples which will serve to fix its exact meaning and application. Under the former system the person who had the actual possession, or the immediate right to the possession, of a chattel which had been taken and carried away or destroyed by the wrong-doer, might recover his compensatory damages in the action of "trespass." To maintain it, the possession or immediate right thereof was an essential element, and the plaintiff recovered the value of the article as the measure of his damages. If, however, the plaintiff had merely a contingent or prospective interest, without right of immediate possession, in a chattel which was at the time the general property of another, *his* appropriate action for the taking, destruction, or conversion of the chattel by a wrong-doer was "case," and his damages were a compensation for the pecuniary loss actually sustained. The distinctions between these two actions have been abolished ; but the distinctions between the primary rights and the wrongs which constitute the two causes of action cannot be removed. Now, as before, if the owner in possession sues for the taking or destruction of his chattel, he will recover its value as his damages ; while, if the holder of a contingent future interest, unaccompanied by possession, sues for the taking or destruction, he will

recover the value of his interest. In the one case the plaintiff must establish his possessory right if he seeks to obtain the value of the chattel as his compensation; in the other case the value of his contingent interest will be proved and fixed by the jury. These elements and features, however, *do not belong to the action* as a judicial instrument for establishing a right; they belong to the primary and remedial rights themselves, which are unchanged by the codes. In the former system of procedure, in the works of text-writers, and in the judgments of courts, the discussion and determination of these unchangeable primary and remedial rights was always intimately connected with, and made an essential part of, the discussion and determination of the rules as to external form in the action itself, so that it was difficult, if not impossible, to distinguish them. From the very nature of the common-law system of procedure, as well as from the judicial habit of mind which it produced, the courts seldom, if ever, passed upon the existence of the primary or the remedial right in the abstract; they decided rather whether the action was of the proper form, or the averments of the pleadings were of the proper nature, to maintain the primary right asserted, and to enforce the remedial right claimed to have arisen. The result was that in the standard treatises and digests primary and remedial rights were classified and arranged under the various forms of action known to the common-law procedure. These forms, with all their incidents, have been swept away; but there is danger lest the technical rules which have been abrogated should be confounded with the principles relating to rights and remedies which remain unaffected by the reform.

§ 110. (A particular feature of distinction between actions—or rather between the rights upon which actions are based—which existed under the common-law system has been preserved under the new procedure. The general classification being made of actions *ex contractu* and those *ex delicto*, there were many cases in which a party who had suffered a wrong by the conversion or the taking and carrying away of his chattels might waive the tort, and bring an action of *assumpsit* upon the wrong-doer's implied promise to pay the price of the articles taken. The same election still exists.) Wherever the plaintiff who could sue in "trespass" or "trover" might, if he chose, bring "assumpsit," he may now waive the tort, and maintain an action upon an implied

promise, and recover the price of the goods as though there had been a sale. (This choice, however, does not relate to the external form of an action; it relates to the very cause of action itself, — to the unchangeable rights which are to be protected and enforced by the judicial proceeding.) In one instance, the plaintiff is permitted to view the transaction as an injury to his property by which he has sustained damages which amount to the entire value of that property. In the other, he views the transaction as a sale, by which the title to the property has passed to the defendant, and a duty to pay the price rests upon him. For reasons of public policy, the law allows the injured party to make his choice between these two quite different versions of the same transaction; and, although one of them may be a fictitious view, substantial justice is done thereby. It is plain, however, that this rule has no connection with the external forms of action; it has reference only to the rights and delicts which lie back of all actions.

§ 111. In conclusion, as the distinctions between the common-law forms of action are abolished, the practice since the codes, sometimes indulged in even by courts in their solemn judgments, of retaining the ancient nomenclature, and of describing a given cause as "trespass," "trover," "assumpsit," and the like, is productive of confusion, and of confusion alone. No practical rules or doctrines in the administration of justice according to the reformed system of procedure result from these old forms; no practical aid in the decision of a cause is to be obtained from regarding it as "trespass," or "trover," or "assumpsit," or from the giving it any other name; no difficulties are removed nor doubts cleared up by a resort to this method of description. On the other hand, there is a constant tendency to associate with these names the rules and doctrines which were once inseparable from them, but which have been in the most positive manner abrogated by the legislature; in fact, much of the doubt and confusion which even yet accompany the administration of justice in those States which have adopted the reformed system of procedure, is due to a retention of these names by the bench and the bar; and I believe that the reform itself will never produce its full results in simplicity and scientific accuracy until the ancient nomenclature is utterly forgotten or banished from the courts. The

two systems of procedure are so entirely different, they are based upon notions so absolutely unlike, that any intermingling of their elements is impossible ; the one which has been introduced by the legislative will must be left to be developed according to its own distinctive principles, without any interference from that which has been abandoned and discarded.

CHAPTER SECOND.

THE PARTIES TO THE CIVIL ACTION.

SECTION FIRST.

THE STATUTORY PROVISIONS, AND THEIR GENERAL PRINCIPLES.

§ 112. The second of the distinctive features which belong to and characterize the single civil action of the American system consists of the principles and rules adopted in respect of the parties thereto. Under the old procedure the rules which governed the parties to actions at law, and those which regulated the parties to suits in equity, stood in marked contrast with each other; in fact, the fundamental conception of these two judicial instruments was radically unlike. It will be sufficient to mention one of these essential differences. In an action at law the plaintiff must be a person in whom is vested the whole legal right or title; and, if there were more than one, they must all be equally entitled to the recovery. So far as the mere recovery is concerned, the right must dwell in them all as a unit, and the judgment must be in their favor equally. The defendants, on the other hand, must be equally subject to the common liability, so that, even if it were possible for the jury to find a separate verdict against each, the same and single judgment must be rendered against them all in a body. In other words, whatever might be the nature of the antecedent right or liability, whatever antecedent power there might be of electing to sue by one or all and against one or all, after the election is made to sue by or against all, the recovery is necessarily joint, and the burden of the remedy is necessarily joint. The suit in equity was hampered by no such arbitrary requirements. Two general and natural principles controlled its form: *first*, that it should be prosecuted by the party really in interest, although with him might be joined all others who had an interest in the subject-matter and in obtaining the relief demanded; and, *secondly*, that all persons whose presence is necessary to a complete determina-

tion and settlement of the questions involved shall be made parties, so that in one decree their various rights, claims, interests, and liabilities, however varying in importance and extent, may be determined and adjudicated upon by the court. As the methods adopted by the chancellor did not require him to pronounce a judgment in favor of all the plaintiffs, nor indeed in favor of plaintiffs alone, and against all the defendants, nor indeed against defendants alone, it was not a matter of vital importance whether a particular person who was made a party should be a plaintiff or a defendant. It was possible to give relief to defendants as against each other or against plaintiffs. It must not be understood that no order or method was observed in the disposition of parties; but, without discussing the various rules in detail, it is sufficient for my present purpose to point out this fundamental difference in conception between legal and equitable actions. The intention plainly shown in the various State codes of procedure is to adopt the general equity theory of parties, rather than the legal theory, and to apply it to the single civil action in all cases, whatever be the nature of the primary right to be protected or of the remedy to be obtained. How far this intention has been expressed, how completely it has been carried out in the legislation of the several States, will be seen from the provisions themselves to be immediately quoted. After making these extracts and grouping them properly, I shall very briefly point out their general similarity and their special divergencies from the common type, and shall then proceed in the succeeding sections of the present chapter with a careful discussion of each separate provision. It will be seen that there is an almost complete identity in many of these statutory rules as they are expressed in the various codes, although in some of them the equitable theory has been more fully carried out into detail.

§ 113. *Statutory Provisions.* "Every action must be prosecuted in the name of the real party in interest except as otherwise provided in [this chapter, this article, or some designated section]; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."¹ The same appears slightly varied in a few States, as follows: "Every action must be prosecuted in the name of the real party in

¹ Indiana, § 3; Kansas, § 26; Minnesota, § 27, 879; Nevada, § 4; Kentucky, § 30; Iowa, § 26; Missouri, art. 1, § 2; Wisconsin, ch. 122, § 12; Florida, § 62; Oregon, Washington, § 8; Montana, § 4.

interest, except as is otherwise provided in [this title or article].”¹ In some codes the form is that first given above, but to it is added the following clause: “But an action may be maintained by the grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.”² In Nebraska the following provision is added: “The assignee of a thing in action may maintain an action thereon in his own name and behalf without the name of the assignor.”³

§ 114. “In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defence [now allowed, *Ohio, Kansas, Nebraska*], existing at the time of or before notice of the assignment; but this section shall not apply to [negotiable bonds, *Ohio, Kansas, Nebraska*] negotiable promissory notes or bills of exchange transferred in good faith and upon good consideration before due.”⁴ “When the action is brought by the assignee of a claim arising out of contract not assigned by indorsement in writing, the assignor shall be made a defendant to answer as to the assignment or his interest in the subject of the action;” and this is followed by the provision in reference to set-off or other defences contained in the last citation.⁵

§ 115. “An executor, an administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.”⁶ The same as slightly varied: “An executor, administrator,

¹ *Ohio*, § 25; *Cal.* § 367; *Iowa*, § 2548; *Neb.* § 28; *Wyoming*, § 31; *Idaho*, § 4.

² *New York*, § 111; *Dacota*, § 64; *California*, § 367; *South Carolina*, § 184; *N. C.* § 55.

³ *Nebraska*, § 28; *Wyoming*, § 32.

⁴ *New York*, § 112; *Ohio*, § 26; *Kansas*, § 27; *Minnesota*, § 27; *California*, § 368; *Wisconsin*, ch. 122, § 13; *Indiana*, § 6; *Nebraska*, § 29; *Florida*, § 68; *Kentucky*, § 31; *South Carolina*, § 186; *Oregon*, §§ 28, 382; *Nevada*, § 5; *Dacota*, § 65; *Iowa*,

§ 2546, somewhat different in form from the text. *N. C.* § 55; *Wash.* § 3; *Idaho*, § 5; *Wyoming*, § 33; *Mont.* § 5.

⁵ *Indiana*, § 6.

⁶ *New York*, § 113; *Indiana*, § 4; *Minnesota*, § 28; *California*, § 369; *Missouri*, art. 1, § 3; *Wisconsin*, ch. 122, § 14; *Florida*, § 64; *South Carolina*, § 186; *Oregon*, § 29; *Nevada*, § 6; *Dacota*, § 66; *North Carolina*, § 57; *Washington*, § 4; *Idaho*, § 6; *Wyoming*, § 34; *Montana*, § 6.

trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."¹

§ 116. "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title."² "Any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."³ In a few codes the same provision appears, but added to it is the following clause: "And in an action to recover possession of real estate the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession to real estate may be made a party plaintiff or defendant as the case may require to any such action."⁴

§ 117. "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint [or petition].

[And] when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."⁵

¹ Ohio, § 27; Kansas, § 28; Iowa, § 2544; Nebraska, § 30; Kentucky, § 88.

² New York, § 117; Ohio, § 84; Indiana, § 17; Kansas, § 35; California, §§ 378, 381; Missouri, art. 1, § 4; Wisconsin, ch. 122, § 18; Iowa, § 2545; Nebraska, § 37; Florida, § 68; Kentucky, § 34; South Carolina, § 140; Oregon, § 380, but limited to equitable actions; Nevada, § 12; Dakota, § 70; N. C. § 60; Idaho, § 12; Wyoming, § 40; Montana, § 12; Washington, § 8.

³ Ohio, § 35; Indiana, § 18; Kansas, § 36; Missouri, art. 1, § 5; Wisconsin, ch. 122, § 19; Iowa, § 2547; Nebraska, § 38; Florida, § 69; Kentucky, § 35; Nevada, § 13; Oregon, § 380, limited to equitable actions; Dakota, § 71; Washington, § 8.

⁴ New York, § 118, California, §§ 379,

380; South Carolina, § 141; N. C. § 61; Ida. § 13; Wyo. § 41; Mont. § 13.

⁵ This provision is thus given in one section in New York, § 119; Indiana, § 19; California, § 382; Wisconsin, ch. 122, § 20; Florida, § 70; S. C. § 142; N. C. § 62; Ida. § 14; Wyo. § 42; Mont. § 14; Dakota, § 72; Oregon, § 381, limited to equitable actions; Nevada, § 14, adding, however, to the section as given in the text the following clause: "Tenants in common, joint tenants, and copartners, or any number less than all, may jointly or severally bring, or defend, or continue the prosecution or defence of any action for the enforcement of the rights of such person or persons." The same provision is found in the California code,

§ 118. "Persons severally [and immediately] liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes [and indorsers and guarantors, Kansas], may all or any of them be included in the same action at the option of the plaintiff."¹ The corresponding provision in some of the States is much more full, and more explicitly alters the common-law rules in respect to joint debtors. "Persons severally liable on the same contract, including the parties to bills of exchange and promissory notes, common orders and checks, and sureties on the same or separate instruments, may all or any of them, or the representatives of such as may have died, be sued in the same action at the plaintiff's option."² "Every person who shall have a cause of action against several parties, including parties to bills of exchange and promissory notes, and be entitled by law to a satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper; and an executor or administrator, or other person liable in a representative character, may be joined with others originally liable, at the option of such person."³ "When two or more persons are [jointly, *Kentucky*] bound by contract [or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally, and including the parties to negotiable paper, common orders or checks, and sureties on the same or separate instruments, or by any liability growing out of the same, *Iowa*], the action thereon may at the plaintiff's option be brought against all or any of them. When any of those [the persons, *Kentucky*] so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the deceased [with the representatives of any or all of the decedents, *Kentucky*], or against any or all of such representatives [or against the latter or any of them, *Kentucky*] [when all the persons so bound are dead, the action may be brought against the

§ 884, except that "coparceners" is substituted in place of "copartners." In the following States it is separated into two sections corresponding to the two paragraphs of the text: Ohio, §§ 86, 87; Kansas, §§ 37, 38; Iowa, §§ 2548, 2549; Nebraska, §§ 39, 40; Kentucky, §§ 86, 87; Wash. §§ 8, 9. In Missouri, the first paragraph only is enacted, and is art. 1, § 6.

¹ New York, § 120; Kansas, § 39; Minnesota, § 35, "and sureties on the same in-

strument;" Wisconsin, ch. 122, § 21; Nebraska, § 41; Florida, § 71; Ohio, § 88; Indiana, § 20; California, § 888, adding, "and sureties on the same or separate instrument," after the words "promissory notes;" S. C. § 148; N. C. § 68; Oregon, §§ 36, 382; Nevada, § 15, Ida. § 15, Wyo. § 48, and Mont. § 15, with same addition as in California; Dakota, § 78; Wash. § 10.

² Kentucky, § 88.

³ Missouri, art. 1, § 7.

representatives of all or of any of them, *Kentucky*]. An action or judgment against any one or more of several persons jointly bound shall not be a bar to the proceedings against the others."¹

§ 119. "(1) The court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.

"(2) [And] When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

"(3) A defendant against whom an action is pending upon a contract, or for specific real or personal property, may at any time before answer upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court may in its discretion make the order."²

¹ Kentucky, § 89; Iowa, § 2550. In Kansas all joint contracts are declared to be joint and several; on the death of one or more of the joint promisors or obligors, the right of action exists against the representatives of the deceased and against the survivors; when all die, the right of action exists against the representatives of all the deceased debtors; in all cases of joint obligations or joint "assumptions" of partners or others, the action may be prosecuted against any one or more of those who are so liable. See Gen. Statutes (1868), ch. 21, §§ 1-4. The same provisions are found in the statutes of Missouri, Wagner's Stat., vol. i. p. 269, §§ 1-4.

² In the following States these provisions form a single section, as in the text: New York, § 122; Wisconsin, ch. 122, §§ 22, 23; Florida, § 73; South Carolina, § 145; N. C. § 65; Nevada § 17; Idaho, § 17;

Dacota, § 75. In these others they are separated into three sections, corresponding to the three subdivisions of the text: Ohio, §§ 40, 41, 42; Kansas, §§ 41, 42, 43; Nebraska, §§ 43, 44, 45. In others still they form two sections, embracing respectively the first and second subdivisions and the third: Indiana, §§ 22, 23; Kentucky, §§ 40, 41. In California, §§ 389, 386, correspond to the first and third subdivisions of the text. In the others there is but one section identical with the first subdivision of the text: Oregon, §§ 40, 382; Mis. art. 8, § 4; Iowa, § 2551; see Minnesota, §§ 88-41; Wash. §§ 12-14; Wyo. §§ 45-47; Mont. §§ 17-22. The provisions of the Iowa and California codes in relation to "intervening," which are very special and unlike that in the text, are quoted in a subsequent section of this chapter.

§ 120. The following special provisions, found in several of the States, are quoted, not because they are necessarily involved in the general theory of the reformed system, but because they will serve to explain a number of cases which will be cited hereafter, and because they show the tendency of the modern legislation away from the arbitrary notions of the common law in respect of parties. "A father, or, in case of his death or desertion of his family [or imprisonment, *Indiana*], the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward is not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there is no loss of service."¹ "When a husband has deserted his family [or is imprisoned, *Indiana*], the wife may prosecute or defend in his name any action that he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had."² "A father, or, in case of his death or desertion of his family [or imprisonment, *Indiana*], the mother, may maintain an action for the injury [or death, *Indiana, Oregon, California*] of the child [an action for the expenses and actual loss of service resulting from the injury or death of a minor child, *Iowa*], and the guardian for the injury [or death, *Indiana, Oregon, California*] of the ward."³ "An unmarried female may prosecute as plaintiff an action for her own seduction, and recover such damages as may be found in her favor."⁴

§ 121. In several of the States a partnership may sue or be sued by its firm-name alone, the judgment being enforceable against the property of the firm and of such members as are personally served, provision being made for extending its effect to the other members by some subsequent proceeding. The following is the type of these provisions, and they are all substantially the same: "An action may be brought by or against a partnership, as such, or against all or either of the individual members thereof; and a judgment against the firm, as such, may be enforced against the partnership property, or that of such members as have appeared or been served with notice. And a new action may be brought against the other members on the original cause of ac-

¹ Minnesota, § 32; California, § 875; Iowa, § 2556. But the last clause, as to the guardian and ward, is not found in the Oregon, § 34; Indiana, § 25.

² Minnesota, § 34; Indiana, § 26; Iowa code, § 33; Indiana, § 27. Iowa, § 2564.

³ Iowa, § 2555; California, § 874; Ore-

⁴ Minnesota, § 33; California, § 876; gon, § 85; Indiana, § 24.

tion.”¹ Certain other special provisions in relation to parties will be quoted in subsequent sections, and especially the legislation of the various States concerning suits by and against married women. This legislation in several instances does not form a part of the codes of procedure, but is contained in separate statutes having particular reference to the status of marriage.

§ 122. The foregoing are all the provisions relative to parties in general. It is plain, upon the most cursory reading, that the language of these sections is so comprehensive, and without exception or limitation, that it appears to include all actions, legal and equitable, and to apply the equitable doctrines alike to both classes. It should be observed, however, in this connection, that in a vast number of actions strictly legal the equitable theory of parties, as stated in these clauses, would determine the proper parties thereto in exactly the same manner as the common-law theory, and there could arise, then, no conflict. The possible conflict which could arise in other cases would result either (1) from the old notion that in a common-law action all the plaintiffs must be equally interested in the recovery, and all the defendants equally liable to the judgment, so that no person could be a plaintiff who did not allege for himself this community of interest, or be made a defendant against whom this community of liability was not charged, or (2) from the common-law doctrine of joint, joint and several, or several rights and liabilities which controlled to a very great extent the rules as to parties in legal actions. One school of judges, applying to this particular topic the theory of interpretation described in the preceding chapter, have been unable to concede that the general statutory provisions quoted above did repeal and abrogate these long and firmly established rules and doctrines of the common law, and have therefore wished to confine their operation and effect to equitable actions.² Another school of judges, regarding the codes as highly remedial statutes, have been inclined to follow out their spirit, and to give their language the fullest meaning of which it is capable, even to the extent of holding that its general expressions abolished and swept away the legal distinctions between joint, joint and several, and several rights and liabilities. The influence and

¹ Iowa, § 2553; Minnesota, § 37; California, § 888; Ohio, § 629; Nebraska, §§ 24, 27.

² As an illustration of these views, see the opinion of S. L. Selden J. in *Voorhis v. Child's Ex'ors*, 17 N. Y. 364.

effect of these different systems of interpretation will be shown in the succeeding sections of this chapter.

§ 123. In a few of the States the legislation has left no room for any such conflict of opinion, and has pushed the equitable theory to its final results by express enactments which leave nothing to implication. The codes of these States provide for bringing in parties to certain legal actions under some circumstances merely because they have an interest in the event of the suit, although they have no share in the relief, and bear no part of the liability; and they utterly abrogate the common-law rules relative to joint, joint and several, or several liabilities. In these States, therefore, there can be no doubt as to the construction which should be put upon the general statutory provisions quoted; and they are treated as establishing the equity doctrine and applying it to actions of all kinds. In the succeeding sections of this chapter I shall pursue the order of the legislation which is the same in all the States, and shall separately discuss the following subjects: The Real Party in Interest to be made Plaintiff; The Assignability of Things in Action; The Effect of an Assignment of a Thing in Action upon the Defences to it; A Trustee of an Express Trust, &c., to sue alone; Who may be joined as Plaintiffs; Who may be joined as Defendants; When One or More may sue or be sued for All; Parties severally liable on the same Instrument; Bringing in New Parties; Intervening; and Interpleader. It is proper to remember that the doctrine as to Parties cannot be exhaustively discussed until the chapter is reached which treats of Judgments. The subject of rights and liabilities, joint, joint and several, or several, which is embraced under the head of Judgments, is so intimately involved with the subject of Parties that the two cannot be completely separated.

SECTION SECOND.

THE REAL PARTY IN INTEREST TO BE MADE PLAINTIFF.

§ 124. "Every action must be prosecuted in the name of the real party in interest, except when otherwise provided in this title [or chapter, or article]," is the sensible and comprehensive form used in Ohio, California, Iowa, Nebraska, Wyoming, and Idaho. To this is added: "But this section shall not be deemed to

authorize the assignment of a thing in action not arising out of contract," in New York, Indiana, Kansas, Missouri, Wisconsin, Florida, South Carolina, Kentucky, Oregon, Nevada, Dakota, North Carolina, Washington, and Montana. It was sometimes said that at the common law a thing in action, not negotiable, could not be assigned; but the true meaning of the rule was merely this, that the assignee could not bring an action upon it in his own name. Courts of law had long recognized the *essential* validity of such assignment in a large class of cases, by permitting the assignee, who sued in the name of his assignor, to have entire control of the action, and by treating him as the only person immediately interested in the recovery. Indeed, the assignment gave to the assignee every element and right of property in the demand transferred, except the single one of suing upon it in his own name: it was regarded as assets in his hands and in those of his personal representatives; his rights were completely protected against the interference of the assignor with an action brought in the latter's name. It is true, the property derived from the assignment was said to be equitable, and not legal; but this distinction did not lessen the intrinsic, essential nature of the ownership. It would seem that the property of the assignee is now strictly *legal*, although the question does not require any solution in this work.

§ 125. One effect—and perhaps the principal effect of this statutory provision—is, that all assignees of things in action *which are assignable* may sue upon them in their own names, and are no longer obliged to sue in the names of the original assignors.¹ It is not strictly correct to say that the provision itself renders any thing in action assignable, that it creates any attribute of assignability; but, for the purpose of defeating such possible interpretation, the second clause was added in many of the codes. This limiting clause, however, is only negative in its form and meaning. It merely forbids a certain construction to be placed upon the preceding language. It does not say that no thing in action is assignable unless it arises out of contract. The

¹ This provision only applies to "actions" as defined in the code, and not to special proceedings. The proceeding to enforce a mechanic's lien, in pursuance of certain special statutes in New York, is not an action; and the original holder of the lien who had assigned it, is the proper party to institute the proceeding for the benefit of his assignee. *Hallahan v. Herbert*, 57 N. Y. 409.

rules governing this quality of things in action are found in other provisions of the law, and not in this section. It will be seen in the sequel that a large class of things in action not arising out of contract, but which arise out of torts to property, may be assigned, and that the assignee may, therefore, bring an action upon them in his own name. It is plain, however, that a full discussion of this section requires an exhaustive examination of the question, What things in action may be assigned? And this examination will be made in the next succeeding section of the present chapter.

§ 126. The immediate and in some respects the most important consequence of the rule that "every action must be prosecuted in the name of the real party in interest," is this: wherever a thing in action is assignable, the assignee thereof must sue upon it in his own name. I shall therefore, in the first place, discuss this result, and ascertain the extent to which it has been carried, and the cases to which it has been applied. It is abundantly settled that when a thing in action, transferable by the law, is absolutely assigned, so that the entire ownership passes to the assignee without condition or reservation, and the legal title is fully vested in him, he is the real party in interest, and may sue upon it in his own name, and is, in fact, the only proper party to bring the action, — as in the case of a claim for the use and occupation of land thus assigned;¹ a partnership demand transferred by the other partners to one member of the firm;² a delivery bond taken by a constable for the delivering up of property which he had seized on execution and transferred to the plaintiff in the action;³ the right of action to recover damages for a breach of a covenant of seisin in a deed of conveyance assigned by the grantee;⁴ a claim for borrowed money.⁵ It was held in Missouri that the assignee of a thing in action arising out of contract must sue in his own name, although there was no specific statutory provi-

¹ *Mills v. Murry*, 1 Neb. 327, and a claim of damages for waste against a tenant or subtenant in favor of the reversioner, and by him assigned to the plaintiff. *Rutherford v. Aiken*, 8 N. Y. Sup. Ct. 60.

² *Canefox v. Anderson*, 22 Mo. 347. A non-negotiable note payable in work, *Schuler v. Fay*, 12 Kans. 184; *Williams v. Norton*, 3 Kans. 295.

³ *Waterman v. Frank*, 21 Mo. 108;

and see *Moorman v. Collier*, 32 Iowa, 188. Where a bond is taken in an action by an officer for the security of any particular person, that person is the real party in interest.

⁴ *Van Doren v. Relfe*, 20 Mo. 455; *Uteley v. Foy*, 70 N. C. 803 (a land contract).

⁵ *Smith v. Schibel*, 19 Mo. 140; *Knadler v. Sharp*, 86 Iowa, 232, 235 (an open account).

sion in that State permitting such a demand to be assigned, and the statutory provision to that effect formerly existing had been omitted from the revision of the laws then in force. The clause of the Practice Act [the Code] was enough to authorize the action because he was the real party in interest.¹

§ 127. Not only does the rule prevail when the assignment is absolute and complete, and the assignee is the legal owner of the demand; it prevails with equal force in cases where the assignment is simply equitable in its character, and the assignee's title would not have been recognized in any form by a court of law under the old system, but would have been purely equitable. Such assignee, being the real party in interest, must bring an action in his own name; for, in respect to this provision of the statute, the equity doctrine which it embodies is, beyond a question, to be applied to all actions.² As illustrations: the person to whom an order is given by a creditor upon his debtor for the whole amount of the demand, although the debtor has not accepted nor promised to pay, is an equitable assignee, and must sue in his own name;³ also, where a creditor assigns part of his

¹ Long v. Heinrich, 46 Mo. 603.

² See Cottle v. Cole, 20 Iowa, 481, 485; Lytle v. Lytle, 2 Metc. (Ky.) 127. In the first of these cases Mr. Justice Dillon said: "The course of decision in this State establishes this rule; viz., that the party holding the legal title of a note or instrument may sue upon it, though he be an agent or trustee, and be liable to account to another for the proceeds of the recovery; but he is open in such case to any defence which exists against the party beneficially interested. Or the party beneficially interested, though he may not have the legal title, may sue in his own name. This may not precisely accord with the line of decisions under other codes, but we think it liberal and right, and conducive to the practical attainment of justice." In Lytle v. Lytle, Duval J. said (p. 128): "Upon the face of the petition in this case, it is perfectly clear that the plaintiff was not the owner of the debt for which the action is brought; but that Harmon [the assignee] is the equitable owner of it, and he is, therefore, the real party in interest; and under the plain rule of practice (§ 30) the action should have been brought in his name as

plaintiff. It is true that, according to § 81, the assignor, Mrs. Lytle, was a necessary party as plaintiff or defendant, as the assignment was not authorized by statute, and did not invest the assignee with the legal title to the debt assigned." This last remark refers to a clause of the Kentucky code requiring the assignor to be made a party plaintiff or defendant, when the demand is not negotiable, or the assignment is not expressly authorized by some statute, so as to answer to the assignment and his own interest in the subject-matter.

³ Wheatley v. Strobe, 12 Cal. 92, 98; Walker v. Mauro, 18 Mo. 564. Upon facts as stated in the text, Gamble J. says in the last case: "The effect of our new code of practice, in abolishing the distinctions between law and equity, is to allow the assignee of a *chose in action* to bring a suit in his own name in cases where, by the common law, no assignment would be recognized. In this respect, the rules of equity are to prevail, and the assignee may sue in his own name." He goes on to show that this is an equitable though not a legal assignment.

claim to the plaintiff, of which the debtor has notice;¹ and when a bond was verbally assigned, and was delivered by the obligee to the plaintiff;² and when the assignment, though absolute on the face, was, in fact, partial, the assignee agreeing to account for the remaining portion to the assignor. In this case the assignor might be brought in to protect his own interests, and, in some States, would be an indispensable party.³ The rule deduced from these authorities is plain and imperative: The

¹ *Grain v. Aldrich*, 38 Cal. 514. The defendant being indebted to Brooks & Co. in the sum of \$159,000, the latter assigned \$4,000 of the claim to the plaintiff, who brings this action. The defendants had notice of the assignment. Sanderson J., speaking for the court, says, that under the common-law practice an assignment of a part of an entire demand was void at law, unless made with the consent or ratification of the debtor; but, "under the system of practice which prevails in this State, such results do not follow." After observations upon the union of legal and equitable methods, he goes on to show that in equity the assignee of part of a demand could maintain an action if he made the assignor a party. Had Brooks & Co. been made plaintiffs, and a prayer added for an account and apportionment of the debt, the strict requirements of the old equity practice would have been met; but the code reaches the same result in a shorter and simpler manner. See *Shaver v. West. Un. Tel. Co.*, 57 N. Y. 459, 464. A clerk in the employ of the company, with the knowledge and assent of its president, gave the plaintiff for value the following written order: "Treas. of the West. U. T. Co. Please pay D. L. N. \$50 monthly, commencing at, &c., until \$300 is paid, and charge same to my salary account." He was all the time working at a monthly salary exceeding \$50. This order was presented to the treasurer and filed with him; before any payment it was countermanded by the drawer. The holder, suing the company claiming to be an assignee of the clerk's claim, the Commission of Appeals held that the order was not an equitable assignment, because it did not direct the payment "to be made out of any designated fund or particular source." Dwight J. dissented.

² *Conyngham v. Smith*, 16 Iowa, 471,

475, per Wright C. J. "In other words, the equitable rule as to parties is now applied to law actions, if the relief asked may be given in that court. And therefore, if the plaintiff is the real owner of the bond, if it had been actually sold and transferred to him by a valid verbal contract, there is no reason why, under our present system of pleading and practice, he may not maintain the action in the manner and form as stated in his petition." *Barthol v. Blakin*, 34 Iowa, 452, and *Moore v. Lowry*, 25 Iowa, 386. Same decision in case of mortgages verbally assigned. *S. P. Green v. Marble*, 37 Iowa, 95; *Andrews v. McDaniel*, 68 N. C. 885 (an unindorsed note).

³ *Gradwohl v. Harris*, 29 Cal. 150. The action was brought by plaintiff as assignee of W. & B. of a contract for the payment of money. W. & B. *intervened*, alleging that, though the assignment was absolute on its face, it was actually for one-fourth only of the demand, and they (W. & B.) were entitled to three-fourths of the recovery. The court held that the action was properly brought, but also that the intervention was proper, and gave a judgment that the plaintiff recover one-fourth and W. & B. three-fourths of the demand. Such an intervention and judgment would doubtless shock a lawyer bred in the old school; but it is convenient, sensible, and every way worthy of universal adoption. The common-law objection that a divided judgment is impossible is simply absurd; the thing is done, and is therefore possible. See also *Allen v. Brown*, 44 N. Y. 228, 231; *Durgin v. Ireland*, 14 N. Y. 822; *Williams v. Brown*, 2 Keyes, 486; *Paddon v. Williams*, 1 Robt. 340; *Meeker v. Claghorn*, 44 N. Y. 349, 353; *Wetmore v. San Francisco*, 44 Cal. 294, 300; *Lapping v. Duffy*, 47 Ind. 56; *Boyle v. Robbins*, 71 N. C. 180.

assignee need not be the legal owner of the thing in action; if the legal owner, he must of course bring the action; but, if the assignee's right or ownership is for any reason or in any manner equitable, he is still the proper plaintiff, in most of the States the only plaintiff, although, in a few, the assignor should be joined as a plaintiff or as a defendant. The plain intent of the statute is to extend the equity doctrine and rule to all cases.¹

§ 128. As the statutory provision declares that "every action must be prosecuted in the name of the real party in interest," the defence that the plaintiff is not such real party in interest is, in general, a bar to the suit. This is certainly so when the plaintiff is the assignee of any thing in action not negotiable, and the issue raised by an answer setting up such defence would be simply whether the plaintiff was, upon the proof, the real party in interest. If, however, the thing in action is an instrument negotiable in its nature, the subject is complicated by the special doctrines and rules of the law which relate to the quality of negotiability. It is elementary that possession of negotiable paper, payable to bearer, is at least *prima facie* evidence of ownership; and it is also settled that when such paper, payable to order, is indorsed and delivered to the indorsee, the legal title passes to him, and he may maintain an action thereon; while the maker, acceptor, or indorsers cannot question his title, at least in any manner short of impeaching its good faith. This legal title carried with it the right to sue, no matter what arrangements might be made between him and his immediate indorser concerning the use of the proceeds. The question, then, arises, Has the rule introduced by the code changed these established doctrines? Does the apparent and formal legal ownership resulting from the possession of a negotiable instrument payable to bearer, or from the indorsement and possession of similar paper payable to order, constitute the plaintiff the real party in interest within the meaning of the code? Or may the defendant go behind this formal title, and show that some other person is the real party in interest, and thus defeat the action? If the latter query must be answered affirm-

¹ McDonald v. Kneeland, 5 Minn. 352, 365, per Atwater J. "The code has wisely dispensed with the absurdity of requiring the assignee to use the name of the assignor in bringing suits, but it does not *therefore* follow that the legal estate in the thing assigned passes to the assignee; on the contrary, the only object of this

provision of the code seems to have been to assimilate the practice in courts of law to that which always prevails in courts of equity, in permitting the real party in interest to sue in his own name. The interest or right acquired under this assignment is an equitable one."

atively, it is evident that the statutory provision under consideration has made an important change in the law of negotiable paper. The question thus proposed has given rise to some conflict in opinion, and is not entirely free from doubt. On the one side, it has been urged that the language of the section in all the State codes is most general and comprehensive, containing no exception in terms nor by implication, and that it is, in its highest degree, imperative, "*must* be prosecuted in the name of the real party in interest," except in the single case of "the trustee of an express trust," and that the real party in interest is the person for whose immediate benefit the action is prosecuted, who controls the recovery, and not the person in whom the mere naked apparent legal title is vested. On the other side, it is urged that the rule permitting such a holder or indorsee to prosecute the action is one of the elementary doctrines of the law relating to negotiable paper, — a rule, not of practice or procedure, but of the mercantile and commercial law, — and that the legislature cannot have intended, by such a general clause of a statute concerning procedure, to abrogate well-settled principles of the law-merchant. I will examine and compare some of the cases in which the question has been discussed.

§ 129. In *Edwards v. Campbell*,¹ which was an action upon a note payable to bearer, the plaintiff had the note in his possession; but a judgment in his favor was reversed on the ground that he was not the real party in interest. *Killmore v. Culver*² was an action upon a promissory note payable to Tanner or bearer. The answer denied the plaintiff's ownership, and alleged that Tanner was the real owner. It was sufficiently established by the evidence that the plaintiff was acting simply as agent for Tanner, and would be immediately accountable to the latter for all the money recovered. These facts were held to constitute a complete defence, on the ground that Tanner was the real party in interest, and should have been the plaintiff. In *James v. Chalmers*,³ it was said by one of the judges of the New York Court of

¹ *Edwards v. Campbell*, 23 Barb. 423.

² *Killmore v. Culver*, 24 Barb. 656, 657, per S. B. Strong J. "Is, then, this plaintiff the real party in interest? It seems to me from the evidence given by himself and T. that he is not. He is not at all interested in the event of the suit;

for, should he recover, the money must go to T., and, should he fail, the loss would not be his, but would fall upon T."

³ *James v. Chalmers*, 6 N. Y. 209, 215, per Welles J. It is held in *Hereth v. Smith*, 33 Ind. 514, and cases cited, that, if the defendant desires to raise the issue

Appeals, in reference to actions upon negotiable paper: "Under the code of procedure, if it appears that the plaintiff is not the real party in interest, it is a bar to the action, and no further defence is necessary." The question was very elaborately discussed by the courts of New York in *Eaton v. Alger*,¹ which was an action by the indorsee of a note. The Supreme Court held that the defendants might prove that the plaintiff had no interest in the note, but was a mere agent of the payee, and was bound to account to him, on demand, for the proceeds, and that these facts would constitute a complete defence to the action.

§ 130. Cases of higher authority, because decided by the New

in such an action, he must allege facts showing that the plaintiff is not the true party in interest; a denial is not sufficient.

¹ *Eaton v. Alger*, 57 Barb. 179, 189. As the opinion of the court by James J. in this case contains a full statement of the argument in favor of the conclusion reached, I quote from it at considerable length. Evidence offered to prove the facts mentioned in the text was rejected on the trial, and a verdict was ordered for the plaintiff. "The question in this case is, whether the defendants should have been allowed to prove that the plaintiff is not the real owner of the note in suit. Every action is required to be brought in the name of the real party in interest, except as otherwise provided. No other provision covers a case like this. It would, therefore, seem very clear that a defendant, on such an issue made by the pleadings, would have the right to show that the plaintiff was not the real party in interest, particularly if he had pleaded a defence in the action good as against such pretended real party. The plaintiff, however, insists that, notwithstanding this provision of the code, the indorsee of a note, or the holder of a note payable to bearer or indorsed in blank, may maintain an action upon it, although not in fact the owner, nor, as between himself and the owner, entitled to the proceeds when collected. That such was the rule before the code is conceded, and the argument is that it was abolished by the code." Quoting from the Report of the Code Commissioners in relation to the section in question, he proceeds: "This section

(§ 111) was adopted by the legislature precisely as submitted by the codifiers, showing that they approved of the reasons given by the codifiers for its adoption. It is quite immaterial, therefore, what was the rule previous to the code, if thereby the legislature intended to and did change the rule by express enactment. That they did so, we think, is clear from the language of the statute and the reasons for its adoption. In their reasoning, the codifiers alluded to the existing rules, and the necessity for a revision, one purpose of the proposed change being to require the real person in interest to appear in court as such, followed by an act providing that 'every action must be prosecuted in the name of the real party in interest.' This reasoning and this act seem too plain for misconception. The act is emphatic; it uses the Saxon word 'must,'—a verb which has not yet been twisted by judicial construction, like the words 'may' or 'shall,' into meaning something else,—to place beyond doubt or cavil what is intended." He then cites the cases already quoted above in the text, and claims that the case in hand is distinguishable from *Bank of New Haven v. Perkins*, 29 N. Y. 554, and *Brown v. Penfield*, 86 N. Y. 478. He concludes as follows: "The law of this State no longer permits actions to be prosecuted in the name of nominal plaintiffs. The moment that fact appears, the action is ended, no matter what the character of the instrument on which it is founded, whether negotiable or not, or whether the defendant has or has not any defence to the indebtedness."

York Court of Appeals, have established the other rule for that State. In *City Bank of New Haven v. Perkins*,¹ the rule which prevailed prior to the code was reaffirmed and applied to the facts before the court, although no allusion was made in its opinion to the provisions of § 111. The doctrine was stated as follows: "Nothing short of *mala fides* or notice thereof will enable a maker or indorser of such paper to defeat an action brought upon it by one who is apparently a regular indorsee or holder, especially when there is no defence to the indebtedness. As to any thing beyond the *bona fides* of the holder, the defendant, who owes the debt, has no interest." The same rule was repeated in *Brown v. Penfield*;² but in this case also there was no reference made to the provision of the code relating to the real party in interest. It might be considered doubtful whether the question had been put to rest by these two decisions, but all doubt has been removed. The case of *Eaton v. Alger* was carried to the Court of Appeals; the opinion of the Supreme Court was overruled; and the original rule of the law in reference to suits upon negotiable paper was expressly held not to have been changed by the code.³ In this conflict among the decisions, the judgment of the court of last resort of course prevails; and the question is thus settled in New York by the force of authority, whatever may be thought of the comparative weight of the argument in support of either rule.

§ 131. The doctrine which prevails in Iowa seems to be the same as that now established in New York.⁴ The construction given to the statutory provision by the court of Indiana is en-

¹ *City Bank v. Perkins*, 29 N. Y. 554, 568, per Johnson J. The learned judge also said: "It will be time enough to determine whether any other person has a better title when such person shall come before the court to claim the bills in question, or their proceeds, from the plaintiff."

² *Brown v. Penfield*, 36 N. Y. 478. The remarks of Davies C. J., in which this doctrine was reasserted, were, however, mere *obiter dicta*. The action was by the plaintiff as assignee of T. & Co. The referee before whom the cause was tried found, as a fact, that T. & Co. never assigned the bills in suit to the plaintiff. The Supreme Court reversed this finding, on the ground that it was contrary to the evidence; and the Court of Appeals affirmed the latter decision. These two

courts thus held that the plaintiff was the assignee of T. & Co., and was the owner of the paper. This ruling completely disposed of the case; and the whole discussion which the learned chief justice thought proper to add was entirely unnecessary.

³ *Eaton v. Alger*, 47 N. Y. 845; s. c. 2 Keyes, 41.

⁴ *Cotter v. Cole*, 20 Iowa, 481, 485, per Dillon J. "The course of decision in this State establishes this rule; viz., that the party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery; but he is open in such case to any defence which may exist against the person beneficially interested."

tirely different, as it is held to include the indorsee and holder of negotiable paper as well as the assignee of any other thing in action. Such indorsee or holder, although possessed of the naked legal title, is not the real party in interest, and is not authorized to sue, if the beneficial interest and the whole right to the proceeds of the recovery is in another party.¹ It is, however, a settled rule of pleading in Indiana, that an answer merely averring that the plaintiff is not the real party in interest, but that some other person named is the real party, without alleging any facts from which these conclusions would arise, presents no issue.² In Kentucky also the defence that the plaintiff is not the real party in interest may be set up in an action upon a promissory note or other negotiable instrument brought by the person who is the apparent holder, or who has the naked legal title, although in that State, by virtue of an express provision of the code, the person having the legal title must also be made a party,

¹ *Swift v. Ellsworth*, 10 Ind. 205. Ellsworth sued on a note made by Swift to one Rowe, and transferred by R. to the plaintiff. The answer set up, as the fourth defence, that the note was assigned by Rowe to the plaintiff to secure the sum of \$2,500, which Rowe owed to the plaintiff, and for no other consideration; that afterwards the defendant paid to the plaintiff the said sum of \$2,500, being all the interest of the plaintiff in the said note, and that the plaintiff has not since acquired any interest in the residue of the said note; that the plaintiff is not the real party in interest in this action, but that the said Rowe is the exclusive owner of said note. This defence was held to be good on demurrer thereto. After citing the Revised Statutes of Indiana, which permit the assignment of negotiable paper, and expressly declare that the assignee may sue thereon in his own name, and quoting the provisions of the code passed subsequently to the statute first referred to, which provide for suits being brought by the real party in interest, and also by "a trustee of an express trust or a person expressly authorized by statute to sue," Hanna J., who delivered the opinion of the court, proceeds as follows: "Is the assignee of a promissory note, who may hold it as such without any real interest, one of that class of persons here referred to as being

'expressly authorized by statute' to sue? Or does the provision have reference to another class of persons, such as guardians of an idiot, &c.? We are of opinion that the clause of the section above quoted does not have reference to the rights of an assignee of a promissory note, but to such persons as may be authorized to sue in their own names, because of holding some official position, as the president of a bank, or the trustee of a civil township. It therefore follows that the real party in interest, as was formerly the rule in equity, must bring the action, subject to the provisions and exceptions of the statute, and that, if any other than those thus authorized should bring suit as plaintiffs, an answer showing affirmatively the facts is a good answer." It will be noticed that the general provision of the code in question was made to override an express permission given by a prior statute to all assignees of negotiable paper to sue upon the same in their own names. This is therefore a much stronger case than any which has arisen in New York. See also *Gillispie v. Fort Wayne, &c. R. R.*, 12 Ind. 898.

² *Lamson v. Falls*, 6 Ind. 309; *Mewherter v. Price*, 11 Ind. 199; *Garrison v. Clark*, 11 Ind. 369; *Swift v. Ellsworth*, 10 Ind. 205; *Hereth v. Smith*, 33 Ind. 514, and cases cited.

either plaintiff or defendant.¹ In an action by the assignee of a note against the maker thereof, it is no defence to show that the assignment was made with intent to defraud certain creditors of the assignor. This does not make the plaintiff any the less the real party in interest. As the assignor participates in the fraud, he could not repudiate his transfer, and has parted with all possible interest in the note.² Whenever the defence that the plaintiff is not the real party in interest is allowable, it must be pleaded in the answer; if not, it will be regarded as waived.³

§ 132. Analogous to the subject discussed in the preceding paragraph is the question whether an assignee, to whom a thing in action has been transferred by an assignment which is absolute in its terms, so as to vest in him the entire legal title, but which, by means of a contemporaneous and collateral agreement, is, in fact, rendered conditional or partial, is the real party in interest. It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of any thing in action is absolute in its terms, so that by virtue thereof the entire apparent legal title vests in the assignee, any contemporaneous, collateral agreement by virtue of which he is to receive a part only of the proceeds, "and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional," does not render him any the less the real party in interest: he is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties, either the assignor or other, to whom the assignee is bound to account. This is the settled doctrine in most of the States.⁴ Notwithstanding the general unanimity of the courts in

¹ *Carpenter v. Miles*, 17 B. Mon. 598, 44 N. Y. 349, 353 (facts similar to the last); *Wetmore v. San Francisco*, 44 Cal. 602.

² *Rohrer v. Turrill*, 4 Minn. 407.

³ *Savage v. Corn Exch. Ins. Co.*, 4 Bosw. 2.

⁴ *Allen v. Brown*, 44 N. Y. 228, 281 (assignment without consideration, and assignee to be accountable to the assignor for all the proceeds); *Meeker v. Claghorn*, 44 N. Y. 349, 353 (facts similar to the last); *Wetmore v. San Francisco*, 44 Cal. 294 (assignment made as collateral security); *Durgin v. Ireland*, 14 N. Y. 322 (assignment in writing absolute, but by a contemporaneous agreement the assignors were to have one-half the proceeds); *Castner v. Sumner*, 2 Minn. 44; *Williams v. Norton*, 3 Kans. 295; *Cottle v. Cole*, 20

sustaining this doctrine, there are still some indications of a different opinion, although it can hardly be said that this difference has been embodied in an adjudication as the *ratio decidendi*. The opinion to which I refer will be found at large in the note, as it is an able argument upon that side of the question.¹ Embraced within the same principle, and governed by the same rule, is the case of an assignee of a thing in action who, by the terms of the transfer, is not bound to pay the consideration thereof until the

Iowa, 481; *Curtis v. Mohr*, 18 Wis. 615; *Hilton v. Waring*, 7 Wis. 492 (assignment as collateral security); *Wilson v. Clark*, 11 Ind. 885; *Gradwohl v. Harris*, 29 Cal. 150. In *Castner v. Cook* the notes in suit, which were for \$3,100, were assigned as security for \$1,600, owing by the payee to the plaintiff, the latter giving back a bond to pay over the balance after satisfying his own demand. Upon these facts, the court, per Atwater J., said: "There may be a question as to whether the assignment of the notes was absolute, or whether a contingent interest remained in the assignor. But in either case the action is properly brought in the name of the plaintiff. . . . The plaintiff was to receive the money; and, if authorized to receive it, the right to bring suit to collect it necessarily follows. Whatever may be the relations of the plaintiff to the assignor can make no difference to the defendants. They can only raise the objection of a defect of parties to the suit, when it appears that some other person or party than the plaintiff has such a legal interest in the note that a recovery by the plaintiff would not preclude its being enforced, and they be thereby subjected to the risk of another suit for the same subject-matter. *Wilson* [the assignor] had no such interest. He had no interest in the notes, and not even a certain resulting interest in the proceeds of the notes." In *Williams v. Norton* a note payable to the order of the payee had been verbally transferred and delivered to the plaintiff without indorsement. The action by such assignee was held to be properly brought, even though he may not be entitled to apply to his own use the whole proceeds. "A delivery by the payee to his surety or indemnitor, with

authority to receive the money and pay the principal debt, will enable the surety to sue in his own name. He will, within the meaning of the code, be the real party in interest."

¹ *Robins v. Deverill*, 20 Wis. 142. The plaintiff sues as assignee of Peet & Williams. Dixon C. J. gave the following opinion (p. 148): "The statute is imperative that every action must be prosecuted in the name of the real party in interest, except as therein otherwise provided. The proof is that the plaintiff is not the owner of the demand sued upon. It belongs to the firm of R. & L., composed of the plaintiff, his brother, and one Lewis. The demand was transferred to the plaintiff alone by words of absolute assignment, no trust being expressed; but, as the plaintiff himself testifies, he holds it nevertheless in trust for his firm. It was received on account of a debt due the firm of R. & L. from P. & W. Upon these facts, it seems to me the plaintiff cannot maintain the action. He is not the real party in interest, nor the trustee of an express trust within the meaning of the statute. His brother and Lewis should have been joined as plaintiffs." After describing the requisites necessary to constitute a trustee of an express trust, the judge concludes: "In this case no agreement is shown that the plaintiff was to take or hold as trustee; and that he is a trustee results only from other circumstances. It is implied from the facts of the partnership, and that the plaintiff received the assignment on account of a debt due the firm." The court refused to pass upon these questions, holding that they were not raised by the pleadings in the cause; that a defect of parties (if any) had been waived.

debt has been collected; he is the real party in interest, and is fully authorized to sue in his own name.¹

§ 133. The following are particular cases in which the assignee was held by the courts to be the real party in interest within the meaning of the codes, and entitled as such to sue in his own name: Where a bond or a mortgage was assigned verbally;² the assignment of a receipt and delivery order, which was in the following words: "1000 bushels of corn. Received in store, on account of S. F. A., 1000 bushels of corn, to be delivered to his order at, etc. etc. (signed) W. H. H.;"³ assignment of a promissory note payable to order without any indorsement;⁴ the assignment of a debt evidenced by a lost note;⁵ where the assignment of a bond or note was by means of a separate instrument in writing;⁶ the assignment of a claim arising from an agreement to pay the defendant in a certain pending suit a stipulated sum of money if he would withdraw his defence;⁷ the assignment of a claim for damages resulting from the wrongful conversion of chattels;⁸ the assignment by a widow of her right of dower after the death of her husband, but before the dower had been set apart to her.⁹ The mere parting with the possession of a note does not, however, constitute an assignment thereof, and the owner is the proper party to sue, although the instrument is in the hands of another person with whom it has been deposited.¹⁰ The assignee of a foreign executor or administrator may

¹ *Cummings v. Morris*, 25 N. Y. 625; s. c. 3 Bosw. 560. 'In delivering the judgment of the Court of Appeals, Allen J. said (p. 627): "The object of the provision (§ 111) was to abolish the distinction between the former practice of courts of chancery and of common law, and to give full effect at law, as well as in equity, to assignments of rights in action, by permitting and requiring the assignee to sue in his own name. If between the assignor and the assignee the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest, whether the assignment was with or without consideration, and notwithstanding the assignee may have taken it subject to all equities between the assignor and third persons."

² *Conyngham v. Smith*, 16 Iowa, 471; *Barthol v. Blakin*, 34 Iowa, 462; *Green v. Marble*, 37 Iowa, 95; *Andrews v. McDaniel*, 68 N. C. 385.

³ *Merchants and Mechanics Bank v. Hewitt*, 3 Iowa, 93.

⁴ *Carpenter v. Miles*, 17 B. Mon. 598; *White v. Phelps*, 14 Minn. 27; *Pease v. Rush*, 2 Minn. 107; *Pearson v. Cummings*, 28 Iowa, 844; *Hancock v. Ritchie*, 11 Ind. 48.

⁵ *Long v. Constant*, 19 Mo. 320.

⁶ *Thornton v. Crowther*, 24 Mo. 164; *Peters v. St. Louis, &c., R. R.*, 24 Mo. 586.

⁷ *Gray v. Garrison*, 9 Cal. 325.

⁸ *Smith v. Kennett*, 18 Mo. 154; *Lazard v. Wheeler*, 22 Cal. 139. In this last case, an action by the assignee to recover possession of the chattels was sustained.

⁹ *Strong v. Clem*, 12 Ind. 37.

¹⁰ *Selden v. Pringle*, 17 Barb. 458.

maintain an action in his own name to recover a debt due to the estate from a person residing within the State in which the suit is brought.¹ Upon the same principle, when a demand not arising within the State, in favor of one foreign corporation against another foreign corporation, is assigned to a resident of the State, such assignee may maintain an action upon it against the debtor corporation, although the original creditor is expressly forbidden by statute to sue under such circumstances. The prohibition of an action between the foreign corporations does not affect the assignability of the claim.²

§ 134. The assignee of a judgment recovered by the defendant in an action brought to recover the possession of chattels may sue in his own name upon a bond given by the plaintiff upon the requisition made for a delivery of the goods to him. The assignment of the judgment carries with it all demands arising upon this bond or undertaking, and the assignee is the real party in interest.³ In like manner, the assignee of a judgment recovered against a sheriff for official misconduct in seizing the plaintiff's property may bring an action in his own name upon the sheriff's bond.⁴ The principle may be stated more broadly. The assignee of any claim or demand may, in general, sue in his own name upon any incidental or collateral security connected with the demand, and by means of which its payment or satisfaction can be enforced. Thus, the assignee of a judgment obtained in a garnishee process may maintain an action in his own name against the garnishees;⁵ the assignee of the cause of action in a pending litigation may sue on an appeal bond given to the plaintiff [the assignor] in the course of the proceedings.⁶ The assignee of a reversion and also of the covenants contained in the lease is the proper party to bring an action to recover damages arising from a breach of such covenants.⁷ When a surviving partner assigns

¹ *Petersen v. Chemical Bank*, 32 N. Y. 21. The decision turned largely upon the law as to foreign administrators and successions. In reference to the questions now under consideration, Denio J. said (p. 45): "The law of maintenance prohibited the transfer of the legal property in a *chase in action* so as to give the assignee a right of action in his own name. But this is now abrogated; and such a demand as that asserted against the defendant in this suit may be sold and conveyed so as to vest in the purchaser all

the legal as well as the equitable rights of the original creditor."

² *McBride v. Farmers Bank*, 26 N. Y. 450, 457.

³ *Bowdoin v. Coleman*, 3 Abb. Pr. 431.

⁴ *Charles v. Haskins*, 11 Iowa, 329.

⁵ *Whitman v. Keith*, 1 Ohio St. 134. In this case, Mr. Justice Scott gives a very full and clear exposition of the statutory provision under consideration.

⁶ *Bennett v. McGrade*, 15 Minn. 132.

⁷ *Masury v. Southworth*, 9 Ohio St. 340. Gholson J., after stating that the

things in action which belonged to the firm, the assignee succeeds to his rights, and must sue in his own name to collect the same.¹

§ 135. In Kentucky, if the assignment is equitable, which is defined to be an assignment not expressly authorized by statute to be made, although the assignee must sue in his own name, the assignor must also be joined as a party plaintiff or defendant;² as, for example, when an execution is assigned,³ or a lease.⁴ In certain States, where the thing in action is not negotiable, or assignable by indorsement, the assignor may be joined as a defendant to answer to his interest and to the assignment.⁵ In other States, however, where similar provisions are not found in the codes or practice acts, the rule is entirely different, and the assignor is not a proper party either plaintiff or defendant. Thus, in Ohio, an assignor having been made a defendant under the general provisions of the code relating to the joinder of parties plaintiff and defendant, it was held that he neither had an interest in the controversy adverse to the plaintiff, nor was he a necessary party to a complete determination or settlement of the questions involved therein, and therefore he had been improperly made a defendant.⁶ This is undoubtedly the rule in all the States whose codes do not contain the special provision permitting or requiring the joinder of assignors in order to answer to the assignment. And even though he may retain some residuary, contingent, or equitable interest, the assignor is not the proper party to sue; the legal title is not only in the assignee, but he is entitled to receive all the proceeds of the recovery, and whatever possibilities the assignor may have, he is not the real party in interest.⁷

statute of 32 Henry VIII. c. 34, allowing the assignee of the reversion to sue on covenants running with the reversion, had not been enacted in Ohio, proceeds (p. 346): "Our code of civil procedure operates on the remedy even more extensively than the statute of 32 H.VIII. c. 34. For whether the covenant be collateral or inhere in the land, if it be assigned, the assignee not only may, but must, sue in his own name."

¹ *Roy v. Vilas*, 18 Wisc. 169.

² *Dean v. English*, 18 B. Mon. 182; *Gill v. Johnson*, 1 Metc. 649; *Lytle v. Lytle*, 2 Metc. 127.

³ *Watson v. Gabby*, 18 B. Mon. 658, 665.

⁴ *Hicks v. Doty*, 4 Bush, 420. By 1 R. S. ch. 22, § 6, "all bonds, bills, or notes for money or property shall be assignable so as to vest the right of action in the assignee."

⁵ Code of Indiana, § 6.

⁶ *Allen v. Miller*, 11 Ohio St. 374.

⁷ *Smith v. Chicago & N. W. R. R.*, 23 Wisc. 267, where it appeared that in proceedings supplementary to execution, before instituted against the plaintiff in another State, the demand in suit had been assigned to a receiver; this was held a complete defence.

§ 136. The thing in action may even be assigned while a suit upon it is pending, and, by the express provisions of the statute, the assignee may either be substituted as plaintiff, or the suit may be carried on to its termination in the name of the original party. Such substitution, when made, is not the bringing of a new action, and does not require a supplemental complaint. If an assignee carries on a suit in the name of the assignor, he must show affirmatively that the transfer was made *pendente lite*.¹

§ 137. It has been decided in some cases that the assignment of part of an entire claim does not enable the assignee to sue in his own name, but that the assignor must still sue for the whole demand.² This rule is based upon the old doctrine of the indivisibility in law of an entire thing in action. Other cases hold that such an assignment conveys an equitable interest, and makes the assignee an equitable owner, so that he may sustain an action brought in his own name, although the assignors may, upon their own application, be allowed to intervene, in order to protect their interests.³ The grantee of land cannot sue in his own name to recover damages for the breach of covenants in the deed to his grantor which do not run with the land, unless the covenants themselves have also been assigned, but the grantor is the proper party; as, for example, the grantee cannot sue upon a covenant of seisin in the deed to his grantor, in those States where that covenant is regarded as broken immediately, if at all, upon the execution of the deed, and as not running with the land.⁴

§ 138. It is no longer, consistently with the provisions of the codes, possible for one person to sue "to the use of" another, as was common in some States. The parties beneficially interested must themselves bring the action.⁵ There are cases which hold that when there is a trustee of an express trust, *he* must bring the action, and that the beneficiary can in no such case sue in his

¹ St. Anthony Mill Co. v. Vandall, 1 Minn. 246; Virgin v. Brubaker, 4 Nev. 81; Warner v. Turner, 18 B. Mon. 758.

² Cable v. St. Louis Marine Railway Co., 21 Mo. 133; Leese v. Sherwood, 21 Cal. 151. See Lapping v. Duffy, 47 Ind. 56; Boyle v. Robbins, 71 N. C. 180.

³ Grain v. Aldrich, 38 Cal. 514; Wiggin v. McDonald, 18 Cal. 126.

⁴ Hall v. Plaine, 14 Ohio St. 417. Under the peculiar circumstances of this

case, the court held that the grantee might sue, because he was the *real* owner of the land, even when in the hands of his grantor; but the general doctrine of the text was affirmed.

⁵ Weise v. Gerner, 42 Mo. 527; Hutchings v. Weems, 35 Mo. 285; Brady v. Chandler, 31 Mo. 28; Van Doren v. Relfe, 20 Mo. 455; Wilkes v. Morehead, Stanton's Code (Ky.), p. 31 (n.); Lytle v. Lytle, 2 Metc. 127, 128.

own name, at least alone.¹ The correctness of this ruling may well be doubted. The section relative to the real party in interest is, in all the codes, imperative; while that in relation to the trustee of an express trust is permissive.

§ 139. The cases thus far considered in this section are all connected with the assignment of a thing in action by the original creditor, and they involve the question, When may the assignee, under such circumstances, be the party plaintiff in an action to enforce the assigned demand? The rule of the statute, that every action must be brought in the name of the real party in interest, applies also to numerous cases which have no connection whatever with assignments and assignees; and I propose, in the remainder of this section, to review and examine these other illustrations of the principle. It is now the settled doctrine in so many of the States, that it may be called the American doctrine, — although the contrary rule has been established in England and in some States, and notably in Massachusetts, where it has been very recently reaffirmed with emphasis, — that, where an express promise is made by A. to B., upon a consideration moving from B., whereby the promisor engages to do something for the benefit of C., as, for example, to pay him a sum of money, although C. is both a stranger to the consideration and not an immediate party to the contract, yet he may maintain an action upon the promise in his own name against the promisor, without in any manner joining as a party the one to whom the promise was directly made.² This rule was originally adopted prior to the reformed procedure, and was based partly upon considerations of convenience, and partly upon a liberal construction of the nature of the contract. The provision of the codes under review places the matter beyond all doubt; for the person for whose benefit the

¹ *Reed v. Harris*, 7 Robt. 151. A Special Term decision, and not entitled to much weight. See *Western R. R. v. Nolan*, 48 N. Y. 513.

² *Kimball v. Noyes*, 17 Wisc. 695; *Sanders v. Clason*, 13 Minn. 379; *Meyer v. Lowell*, 44 Mo. 323; *Cross v. Truesdale*, 28 Ind. 44; *Devol v. McIntosh*, 23 Ind. 523; *Day v. Patterson*, 18 Ind. 114; *Rice v. Savery*, 22 Iowa, 470; *Scott v. Gill*, 19 Iowa, 187; *Allen v. Thomas*, 3 Metc. (Ky.) 193; *Wiggins v. McDonald*, 18 Cal. 126; *Miller & Co. v. Florer*, 15 Ohio St. 148, 151, per White J. *Rogers v. Gosnell*, 58

Mo. 589, 590; 51 Mo. 466; *Myer v. Lowell*, 44 Mo. 323; *Coster v. Mayor of Albany*, 43 N. Y. 399, 411; *Van Schaick v. Third Avenue R. R.*, 88 N. Y. 846; *Ricard v. Sanderson*, 41 N. Y. 179; *Barker v. Bradley*, 42 N. Y. 316, 319; *Secor v. Lord*, 3 Keyes, 525; *Claffin v. Ostrom*, 54 N. Y. 581, 584; *Cooley v. Howe Machine Co.*, 53 N. Y. 620; *Glen v. Hope Mut. Life Ins. Co.*, 56 N. Y. 379, 381; *Barlow v. Meyers*, 6 N. Y. Sup. Ct. 183; *Johnson v. Knapp*, 36 Iowa, 616; *Jordan v. White*, 20 Minn. 91.

promise is thus made is certainly the real party in interest. The following are some examples and illustrations of this rule: Where a partnership assign their assets, and, in consideration thereof, the purchaser agrees with the members to pay all their firm-debts, any creditor of the partnership may sue him upon this undertaking, and recover the amount of the indebtedness due to the plaintiff thus suing,¹ and may even sue him and the sureties who united with him in his undertaking to the assigning parties;² and where many subscribers contributed different sums of money to the defendant for a specified purpose, and he entered into a written contract with three persons, whereby, among other things, he promised to repay the sums so loaned, it was held that any subscriber might sue on the agreement to recover the amount which he advanced;³ and where A. placed a sum of money in the hands of B., which the latter promised to pay over to C., C. may prosecute an action against B. on his promise.⁴ Where the defendant was indebted to A., who was in turn indebted to B. in a less amount, and the two former parties agreed that defendant should pay to B. the amount of the latter's demand, which should be *pro tanto* a payment on his own debt to A., B. was permitted to recover on this promise.⁵ If in a policy of insurance it is stipulated that the loss, if any, shall be paid to a person named not the assured, such person may sue in his own name on the policy.⁶ B. sold and delivered goods to A., and in consideration thereof A. promised to pay a certain sum to C., which was in fact the amount of a debt due from B. to C.; it was held that C. could recover upon the promise so made by A. in his behalf.⁷ Perhaps the most striking illustration of this doctrine, and of the extent to which it has been carried, is found in a class of cases where, upon a conveyance of land, the grantee assumes and promises to pay a debt which is secured by mortgage on the land so conveyed. If the grantee of land incumbered by a mortgage assumes the mortgage debt by a clause in his deed, and promises to pay the same, the creditor-mortgagee may maintain an action against this

¹ Sanders v. Clason, 18 Minn. 379; Dillon v. J. speaks of the rule as well settled. Meyer v. Lowell, 44 Mo. 323, and cases cited; Barlow v. Meyers, 6 N. Y. Sup. Ct. 183.

² Kimball v. Noyes, 17 Wisc. 695; Devo v. McIntosh, 23 Ind. 529; Claflin v. Ostrom, 54 N. Y. 581, 584.

³ Rice v. Savery, 22 Iowa, 470, 477.

⁴ Allen v. Thomas, 8 Metc. (Ky.) 196.

⁵ Wiggins v. McDonald, 18 Cal. 126.

⁶ Cone v. Niagara Fire Ins. Co., 3 N. Y. Sup. Ct. 33, 39; Newman v. Springfield Ins. Co., 17 Minn. 123, 126.

⁷ Hall v. Roberts, 61 Barb. 38.

grantee upon the bond or other evidence of the indebtedness, and recover the amount thereof, and is not restricted to the remedy by foreclosure of the mortgage;¹ and the creditor may thus sue the grantee upon the bond, even though that instrument had expressly provided that the mortgagee should first have recourse on the land, and the obligor should only be liable for the deficiency which might arise after the foreclosure; this stipulation, it was held, protected the obligor personally, and could not be taken advantage of by the grantee who had promised to pay the debt.² The result of these and other decisions is, that the third person, for whose benefit an undertaking is entered into between other parties, may sue upon it, although such undertaking is an instrument in writing and under seal.³ This doctrine is plainly a departure from the technical notions of the common law, which did not permit a person to sue upon a contract unless he was a party to it, or unless the consideration moved from him, and which especially forbade an action upon a sealed undertaking by a stranger. The courts of some States adhere strictly to this old notion, and utterly repudiate the innovation.⁴ The new rule, however, is as convenient as it is just. The objections to it are every way technical and arbitrary, — a repetition of verbal formulas without any convincing reasons. It certainly avoids a circuitry of actions, and it enables the only person beneficially interested in the promise — the real party in interest — to come into court in the first instance and establish his rights, without being driven to enforce them in a roundabout manner through the intervention of a third person, who, if successful, must account to him for the proceeds of the litigation. The true extent and application of the doctrine, and the proper limitations upon it, have been discussed and fixed by the New York Court of Appeals in very recent cases.⁵

¹ *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178.

² *Thorp v. Keokuk Coal Co.*, 48 N. Y. 258.

³ *Coster v. Mayor of Albany*, 48 N. Y. 390, 411; *Van Schaick v. Third Avenue R. R.*, 88 N. Y. 346; *Ricard v. Sanderson*, 41 N. Y. 179; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 258; *Kimball v. Noyes*, 17 Wisc. 696; *Devol v. McIntosh*, 23 Ind. 529; *Barker v. Bradley*, 42 N. Y. 316, 319; *Secor v. Lord*, 8

Keyes, 525; *Claffin v. Ostrom*, 54 N. Y. 581, 584; *Glen v. Hope Ins. Co.*, 56 N. Y. 879, 881; *McDowell v. Laev*, 85 Wisc. 171.

⁴ *Exchange Bank v. Rice*, 107 Mass. 37, per Gray J.

⁵ *Garnsey v. Rogers*, 47 N. Y. 238, 240, per Rapallo J.; *Merrill v. Green*, 55 N. Y. 270, 278; *Turk v. Ridge*, 41 N. Y. 201, 206. See also *Hinman v. Bowen*, 6 N. Y. Sup. Ct. 234, which holds that a defence, good as against the immediate promisee, is also available against the beneficiary. *Phillips v. Van Schaick*, 37 Iowa, 229.

§ 140. Upon the same principle, the equitable owner of a promissory note is the real party in interest within the statute, and is the proper person to sue upon it, although there may be no indorsement; and possession of the instrument is *prima facie* evidence of such ownership.¹ In fact, wherever the spirit of the reformed system is carried out, — and this is now very generally, if not universally, the case, — the equity rule as to parties is freely applied to all legal actions, and this one principle will easily solve all particular cases of difficulty or doubt.² But, as has been shown in preceding paragraphs, the law as to commercial paper has not been changed in several of the States by this provision of the statute in reference to the parties plaintiff; and in those States, therefore, the indorsee, and, *a fortiori*, the payee of a negotiable note or bill may maintain an action upon it, even though there may be relations between himself and third persons which give them a right of action over against him for the proceeds. As, for example, if A., having in his hands money belonging to B., should loan it, and take a note from the borrower payable to himself, he could sue upon it; however much B. might have been interested in the original money, and however valid a demand he may have against A., he is not a party to the note, nor the holder of it.³ In the class of cases already mentioned, where an express contract is made with one for the benefit of another, and the person thus beneficially interested is permitted to sue in his own name, the one to whom the promise was expressly given may, in general, also maintain an action. The promise being actually made to him, and the consideration moving from him, he

¹ *Garner v. Cook*, 80 Ind. 831; *Compton v. Davidson*, 81 Ind. 62. In the latter case, the answer denied that the plaintiff was "the legal owner of the note in suit." This was held no defence, as it was sufficient if he was the *equitable* owner.

² *Conyngnam v. Smith*, 16 Iowa, 471; *Tate v. Ohio, &c. R. R.*, 10 Ind. 174; *Swift v. Ellsworth*, 10 Ind. 206. In the first of these cases, Wright C. J., describing the effect of the Code of Procedure, said (p. 475): "If the cause of action is cognizable at law, the party having the real interest therein is to be heard in that form, if equitable, in equity. His proceeding, in other words, is to be 'ordinary' or 'equitable,' according to the nature of the cause of action. And the

question is determined, not so much by the evidence showing the interest, as by the fact that he is the real party in interest, and has for his cause of action a subject-matter of which the law will take cognizance. In other words, the equity rule as to parties is now applied to law actions, if the relief asked may be given in that court. And therefore, if the plaintiff is the real owner of this bond, if it has been actually sold and transferred to him by a valid verbal contract, there is no reason why, under our system of pleading and practice, he may not maintain his action in manner and form as stated in his petition."

³ *Robbins v. Cheek*, 82 Ind. 828; *Robbins v. Dishon*, 19 Ind. 204.

is *legally* the contracting party, and is clothed with the *legal* right; indeed, he falls under the definition of trustee of an express trust given in another section of the codes.¹

§ 141. The following are additional examples of actions maintained by the real party in interest, and in which the equity doctrine on this subject has been freely applied, although the rights to be protected and the remedies to be obtained were legal. After a judgment had been obtained in an action of ejectment prosecuted according to the old form by John Doe as the fictitious plaintiff, the succeeding action to recover the mesne profits of the land should be brought in the name of the actual owner of the fee, — the lessors of the plaintiff in the ejectment, — they being the real parties in interest.² An undertaking given to the sheriff by the defendant in an action for the recovery of chattels, in order to procure a return of the goods, should be prosecuted by the plaintiff in that action, since he is the real party in interest;³ and it is said to be a general rule in Iowa that when a bond or undertaking is given to an officer, in the course of some judicial proceeding, for the security of any particular person, such person may sue upon it in his own name without the formality of an assignment.⁴ If a levy by virtue of an execution is made upon chattels by a deputy sheriff, and the goods are wrongfully taken from his possession, an action against the wrong-doer should be brought by the sheriff; he is the real party in interest, since the deputy sheriff acted simply as his agent.⁵ An injunction bond having been given to two obligees, defendants in the action, one of them only was injuriously affected by the injunction and suffered any damage therefrom; he alone, it was held, could maintain an action on the undertaking, as he was the only party in interest, and a suit in the names of both united as plaintiffs was

¹ See *Rice v. Savery*, 22 Iowa, 470, 477; *Cottle v. Cole*, 20 Iowa, 481, 485. In the former of these cases, Dillon J. said: "If the promise is made for the benefit of another, who is the real party in interest, the latter may sue, though the contract was made to an agent or trustee; or the agent or trustee, or person in whose name a contract is made for the benefit of another, may sue without joining the party for whose benefit the suit is prose-

cuted." This subject is treated at large in a subsequent section.

² *Masterton v. Hagan*, 17 B. Mon. 825. It must be understood that the new system had gone into effect *after* the commencement of the ejectment, and before that of the second action for mesne profits.

³ *McBeth v. Van Sickle*, 6 Nev. 134.

⁴ *Moorman v. Collier*, 82 Iowa, 188.

⁵ *Terwilliger v. Wheeler*, 35 Barb. 620.

declared to be improperly brought under the code.¹ A plaintiff in a pending suit having moved for the appointment of a receiver, the application was denied on condition that the defendant give a bond or undertaking to account himself as though he were a receiver for all assets which might come into his hands, and in pursuance of this order he gave a bond in form running to the State; the plaintiff having recovered judgment, and the defendant failing to account, the action on the undertaking was properly brought at once by the plaintiff in his own name, without any assignment to him by the State.² A person in whose name a business was secretly carried on by the defendant and others in order to conceal their property and interest from their creditors, was permitted to recover the value of assets received in the course of the business, which had been taken by the defendant and converted to his own use.³ Where several persons were owners of a chattel, but for purposes of convenience the title stood in the name of one of them alone, and he executed a bill of sale of it in his own name to a purchaser who supposed that his immediate vendor was solely interested, it was held that all the owners might join as plaintiffs to recover the price; they were the real parties in interest under the provision of the code.⁴ This case is a particular instance of a general rule. It is now settled that when a simple contract, whether verbal or written, is entered into by an agent in his own name, but really acting on behalf of an undisclosed principal, and the fact of the agency is unknown at the time, but the parties suppose that they are dealing with him on his own individual account, the principal may bring an action and recover upon it as though he had been the party expressly contracting.⁵ In these cases, however, the agent may also bring the action; he being one of the contracting

¹ *Summers v. Farish*, 10 Cal. 847.

² *Baker v. Bartol*, 7 Cal. 551.

³ *Paddon v. Williams*, 2 Abb. Pr. x. s. 88. The plaintiff certainly had the legal title, and the court seemed to think that it should prevail over an alleged equitable title that was based upon fraud. But as the plaintiff was also a participant in the fraud, it is difficult to perceive why the court should interfere and aid him against the one in possession. It is the general rule that persons who have en-

tered into fraudulent arrangements, and, falling into disputes among themselves, apply to the court for help, shall be left *in statu quo*.

⁴ *Silliman v. Tuttle*, 45 Barb. 171.

⁵ *St. John v. Griffith*, 2 Abb. Pr. 198; *Hall v. Plaine*, 14 Ohio St. 417; *Higgins v. Senior*, 8 M. & W. 834; *Sims v. Bond*, 5 B. & Ad. 389, 893, per *Ld. Denman*; *Bastable v. Poole*, 1 C., M. & R. 410, per *Parke B.*; *Hicks v. Whitmore*, 12 Wend. 548; *Taintor v. Prendergast*, 8 Hill, 72.

parties, the agreement being in express terms made with him, he is a proper party to enforce its observance ;¹ the agent may also sue, even where the principal was disclosed, and it was shown that he was acting in behalf of such principal, if the contract is of such a form that the promise is in express terms made to the agent himself.² Where the promise in favor of a principal is implied, the agent cannot in general sue upon it in his own name, but the action must be brought by the principal himself. Thus, where a person making a bet in his own name deposited \$3,000, the amount thereof, with the stakeholder, but of this sum only \$600 was his own money, and the rest had been furnished by other parties — not as a loan — who united with him in the wager, and he brought an action under the statute against the stakeholder to recover back the whole amount of the money so deposited by him, it was held by the New York Court of Appeals that he could only recover the \$600 which he had actually furnished of his own funds ; that he was simply an agent for the owners of the remaining portion of the moneys advanced, and the implied promise to refund arose in their favor alone ; and they must therefore sue in their own names to recover their respective shares.³

§ 142. It is the established doctrine in several States, and by many cases, that an action cannot be maintained by a private person, citizen, freeholder, or tax-payer, either suing alone or on behalf of all others similarly situated, to restrain or remove or redress any public wrong, or nuisance, or unlawful act done under color of legal authority by the officers of a county, town, city, or other municipality, unless the plaintiff has suffered some special wrong, unless some particular injury is done to him which is not sustained by all others in the community alike. As a result of this rule, no citizen or tax-payer or freeholder can prosecute an action to restrain official acts which would create a

¹ See cases cited in last note. *Tyler v. Freeman*, 3 Cush. 261.

² Cases cited in last notes. *Fear v. Jones*, 6 Iowa, 169 ; *Usparcha v. Noble*, 18 East, 282 ; *Buffum v. Chadwick*, 8 Mass. 103 ; *Fairfield v. Adams*, 16 Pick. 381.

³ *Ruckman v. Pitcher*, 20 N. Y. 9. The court say : " An agent may, in many cases, sue upon express contracts made

with himself by name." In this case, the right of action, it was held, rested upon the defendant's implied duty of restoring the money. " But this implied duty or assumpsit arises only in favor of those to whom the money in fact belonged, and therefore cannot be enforced in the name of another person to whom the obligation is in no sense due."

municipal indebtedness; or to set aside and annul such public acts when done, although the indebtedness must some time be paid by means of increased taxation, and the plaintiff's property would be liable for his proportionate share of the tax when levied.¹ On the other hand, actions of the nature and for the purposes described brought by a citizen, tax-payer, or freeholder, are permitted in many and perhaps in a majority of the States, and are common forms of judicial proceeding to restrain the abuse of local legislative and administrative power by municipal officials. Among these remedial processes are actions by a citizen, tax-payer, or freeholder, to restrain or set aside tax proceedings, the levying of assessments for local improvements, the issue of bonds by municipal corporations in aid of railways, and similar acts of a public or *quasi* public nature.² On the other

¹ *Doolittle v. Supervisors of Broome Co.*, 18 N. Y. 155; *Roosevelt v. Draper*, 28 N. Y. 318; *People v. Mayor*, 82 Barb. 102; *Sargent v. Ohio and Miss. R. R.*, 1 Handy, 52; *Carpenter v. Mann*, 17 Wisc. 155; *Kittle v. Fremont*, 1 Neb. 329; *Craft v. Commissioners, &c.*, 5 Kans. 518; *Kirkpatrick v. State*, 5 Kans. 678; *Tift v. City of Buffalo*, 1 N. Y. Sup. Ct. 160; *Comins v. Supervisors*, 3 ib. 296; *Ayres v. Lawrence*, 63 Barb. 454

² *Rice v. Smith*, 9 Iowa, 570; *State v. Bailey*, 7 ib. 890; *State v. Co. Judge*, 7 ib. 186; *Litchfield v. Polk Co.*, 18 ib. 70; *Olmstead v. Supervisors*, 24 ib. 88; *Williams v. Peinny*, 25 ib. 436; *Stokes v. Scott Co.*, 10 ib. 166; *McMillan v. Boyles*, 14 ib. 107; *Rock v. Wallace*, 14 ib. 598; *Ten Eyck v. The Mayor*, 15 ib. 486; *Chamberlain v. Burlington*, 19 ib. 395; *Hanson v. Vernon*, 27 ib. 28; *Hubbard v. Johnson Co.*, 28 ib. 130; *Harney v. Charles*, 45 Mo. 157; *Scribner v. Allen*, 12 Minn. 148; *Howes v. Racine*, 21 Wisc. 514; *Mitchell v. Milwaukee*, 18 ib. 92, 97; *Bond v. Kenosha*, 17 ib. 284, 287; *Veeder v. Town of Lina*, 19 ib. 280, 295-299; *Rochester v. Alfred Bank*, 18 ib. 482, 489; *Sauerhering v. Iron Bridge, &c. R. R.*, 25 ib. 447; *Warden v. Supervisors*, 14 ib. 618; *Kellogg v. Oshkosh*, 14 ib. 623; *Nill v. Jenkinson*, 15 Ind. 425; *Lewis v. Henley*, 2 ib. 382; *La Fayette v. Fowler*, 34 ib. 140; *Harney v. Indianapolis, &c. R. R.*, 32 ib. 244; *Coffman v.*

Putnam Co., 24 ib. 509; *Oliver v. Putnam Co.*, 24 ib. 514; *Nave v. King*, 27 ib. 856; *Harrison Co. v. McCarty*, 27 ib. 475; *Madison Co. v. Brown*, 28 ib. 161; *Andrews v. Pratt*, 44 Cal. 309; *Bucknall v. Story*, 36 Cal. 67; *Douglass v. Placerville*, 18 Cal. 648; *Vanover v. Justices, &c.*, 27 Ga. 354; *Brodnax v. Groom*, 64 N. C. 244; *Galloway v. Jenkins*, 68 N. C. 147; *Worth v. Fayetteville*, 1 Wins. (No. 2, Eq. N. C.) 70; *Mobile v. Waring*, 41 Ala. 189; *Gilmer v. Hill*, 22 La. An. 465; *White Sulphur Springs Co. v. Holly*, 4 W. Va. 597; *Bull v. Read*, 18 Gratt. 78; *Baltimore v. Gill*, 81 Md. 375, 395; *Stodert v. Ward*, 81 Md. 562; *Lane v. Schomp*, 5 C. E. Green, (N. J.) 82; *Merrill v. Plainfield*, 45 N. H. 126; *Barr v. Deniston*, 19 N. H. 170, 180; *New London v. Brainard*, 22 Conn. 552; *Scofield v. Eighth School Dist.*, 27 ib. 499, 504; *Webster v. Harwinton*, 32 ib. 181; *Terret v. Sharon*, 34 ib. 105; *Supervisors v. Hubbard*, 45 Ill. 189; *Vieley v. Thompson*, 44 Ill. 9; *Cleghorn v. Postlewaite*, 43 ib. 428; *Taylor v. Thompson*, 42 ib. 9; *Clark v. Supervisors*, 27 ib. 805, 311; *Butler v. Dunham*, 27 ib. 474; *Perkins v. Lewis*, 24 ib. 208; *Robertson v. Rockford*, 21 ib. 451; *Prettyman v. Supervisors*, 19 ib. 406; *Drake v. Phillips*, 40 ib. 388; *Colton v. Hanchett*, 13 ib. 615; *Dows v. Chicago*, 11 Wall. 108. See *Dillon on Munic. Corp.* §§ 727, 731-738 (2d ed.); *Allison v. Louisville, &c. R. R.*, 9 Bush,

hand, the people cannot maintain a civil action for the redress of mere private wrongs. An action can be brought in their name only to uphold and enforce a distinct right on their part in respect to the subject-matter of the controversy.¹

§ 143. The last clause of § 111 in the New York Code was added as an amendment merely for purposes of certainty, and to remove all possible doubts as to the true meaning of the section. As it was originally enacted without this clause, a doubt had sometimes been suggested whether any action at all could be brought under the circumstances mentioned in the amendment, that is, when land had been conveyed by an owner which at the time was held by a disseisor adversely to such true owner. If brought by the grantee, he could show no title, because the conveyance to him would, by virtue of other rules of the law, be deemed a nullity. If brought in the name of the grantor, it might be said that he was not the real party in interest, and, under the requirements of this section, was forbidden to sue. The code was therefore amended so as to exclude the latter construction, by adding the final provision as it now stands. The purpose of this amendment is really to limit and restrict the operation and effect of the section as originally enacted, and not to create any new authority or right as between the grantor and the grantee for the use of the former's name by the latter, nor to create any new title to the land in the grantee himself.² An express provision exists in the codes of certain States, authorizing partnerships to sue and to be sued by and in their firm-names, without making the individual members by name parties to the action. This provision is merely permissive, and not at all compulsory; it is not a substitute for, but an addition to, the former existing methods of conducting suits.³

247. See also the very late N. Y. cases, *Longley v. City of Hudson*, 4 N. Y. Sup. Ct. 358; *Marsh v. City of Brooklyn*, ib. 413; *Board of Comm'rs. v. Markle*, 46 Ind. 96, 108-109; *Zorger v. Township of Rapids*, 36 Iowa, 175; *Minnesota Oil Co. v. Palmer*, 20 Minn. 468; *Hodgman v. Chicago & St. P. R. R.*, 28 Minn. 48.

¹ *People v. Albany & Susq. R. R.*, 57 N. Y. 161. *People v. Ingersoll*, 58 N. Y. 1; *People v. Fields*, 58 N. Y. 491. See *People v. Sherwin*, 2 N. Y. Sup. Ct. 528.

² *Hamilton v. Wright*, 37 N. Y. 502, 507, per Woodruff J.

³ *Whitman v. Keith*, 18 Ohio St. 184.

SECTION THIRD.

THE ASSIGNABILITY OF THINGS IN ACTION.

§ 144. As the immediate effect of the statutory provision in the preceding section is to enable the assignee of a thing in action to sue in his own name, the question arises and becomes very important in this connection, What things in action are and what are not assignable? This subject is most intimately bound up with that which immediately went before, for it is impossible to determine who is the real party in interest in all cases until it has been determined what things in action may be assigned. The topic has its legitimate place, therefore, in a chapter which treats of parties. Although the clause, which is found in exactly the same words in all the State codes, — “Every action must be prosecuted in the name of the real party in interest,” — allows the assignee of the thing in action to sue in his own name, yet it does not of itself affect the quality of assignability; it does not render any such demands assignable, but leaves them as they were before its enactment under the operation of existing rules of the law. Even the clause which follows in some of the States, — “but this section shall not be deemed to authorize the assignment of things in action not arising out of contract,” — although doubtless intended to limit the effect of the preceding general requirement, has really no practical effect. The section does not authorize the assignment of any things in action, either growing out of tort or out of contract, and it was therefore an empty legislative prohibition to say that it should not be deemed to authorize the assignment of those arising out of tort. It is not said that those things in action arising out of tort shall not be assigned, but only that the authority for such a transfer shall not be found in this particular section of a single statute. If the right to assign such demands is conferred by other statutes, or by any rules of the law independent of statute, it is not taken away by these apparently restrictive clauses. We shall, therefore, find in all the States, and notwithstanding this special provision, that things in action arising out of certain kinds and classes of torts may be assigned as freely and as fully as those springing from contracts.

§ 145. The assignability of demands lying in action was well known prior to the codes of procedure. All contracts in the form of negotiable paper were of course transferable, so that the holder could sue upon them in courts of law in his own name. Other things in action were truly assignable, so that the assignee was regarded as the real owner, but on account of certain ancient technical rules of the common law, which had never been abrogated, he was obliged to bring an action on them at law in the name of the assignor; but if the subject was within the cognizance of a court of equity, he could sue in that tribunal in his own name. The effect of the codes is to extend this equity rule to legal actions. To ascertain what demands are thus transferable, we must recur to rules established prior to and independent of the new system which regulates procedure. There are very few statutes which expressly legislate upon the subject of assignability and directly confer that quality; but there are in most if not all the States special laws which indirectly produce this result. The department of jurisprudence which controls the succession to the personal estates of deceased persons is now very generally reduced, in whole or in part, to a statutory form. Among these express enactments are almost, if not quite, universally found provisions which describe, define, and enumerate the kinds and classes of rights, claims, and demands which had belonged to the decedent, and which pass to his executors or administrators as assets of the estate, and of liabilities which had rested upon the decedent, and which pass over against his personal representatives, and continue to rest upon them in their representative capacity. In other words, these statutes, following a general division recognized by the ancient law, but often altering that division in its details, separate the rights, claims, demands, and liabilities which can belong to or rest upon persons into two classes. The rights, claims, demands, and liabilities forming the one class survive after the death of the person who held or was subject to them, and pass to his executors and administrators as either assets of or as claims against the estate in their hands; those of the other class cease with the death of the person who held or was subject to them, and do not pass to his representatives as assets or liabilities, — which last rule, as it anciently existed, was expressed by the maxim, *actio personalis moritur cum persona*.

§ 146. Since the title of an executor or administrator is regarded by our law as a title by assignment, it was very natural that the courts should consider these statutes as furnishing the criterion by which to determine what things in action are assignable and what are not assignable between living parties. In this manner the statutes referred to have indirectly produced the result as before mentioned. Following the analogies furnished by them, the rule is generally established that whatever things in action will survive and pass to the personal representatives of a decedent as assets of or liabilities against an estate, are assignable by the direct act of parties, while those things in action which will not thus survive and pass to the personal representatives of a decedent are not assignable. This general principle will be developed, and the authorities sustaining it will be quoted, in the succeeding paragraphs. In some States there may be statutes expressly dealing with the subject of assignment *inter vivos*. Thus, the peculiar legislation of Kentucky has already been noticed, which in terms authorizes the assignment of negotiable paper, bonds, and all contracts for money or property; and the judicial construction of the enactment has also been described, which holds that all assignments made in accordance with the provision are legal, so that the assignee may sue alone, but that all others are equitable, so that while the assignee must bring the action because he is the real party in interest, the assignor must also be joined as a party either plaintiff or defendant. I shall now proceed to inquire how far the principle thus announced is sustained by judicial authority, and shall illustrate its operation by an examination of the particular cases in which a thing in action has been held assignable or not assignable.

§ 147. *First: What things in action are assignable.* It is fully established, by a complete unanimity in the decisions, that causes of action which survive and pass to the personal representatives of a decedent as assets, or continue as liabilities against such representatives, are in general assignable, while those causes of action which do not thus survive are not assignable. By the common law, causes of action arising out of contract, unless the contract, being still executory, was purely personal to the decedent, or unless the injury resulting from its breach consisted entirely of personal suffering, bodily or mental, of the decedent, did thus survive; while causes of action arising out of torts did

not in general survive. The statutes in most if not all the States have changed this ancient rule, and have greatly enlarged the class of things in action which survive. It is now the general American doctrine that all causes of action arising from torts to property, real or personal, — injuries to the estate, by which its value is diminished, — do survive and go to the executor or administrator as assets in his hands. As a consequence, such things in action, although based upon a tort, are assignable.¹ The criterion,

¹ The following *resumé* of authorities will show the universality of this rule, and the reasons upon which it is based. *Hoyt v. Thompson*, 5 N. Y. 820, 847, per Selden J.: "All *choses in action*, embracing demands which are considered as matters of property or estate, are now assignable either at law or in equity. Nothing is excluded except mere personal torts which die with the party. A claim, therefore, for property fraudulently or tortiously taken or received, or wrongfully withheld, and even for an injury to real or personal property, may be assigned;" citing *People v. Tioga County*, 19 Wend. 78; *Haight v. Hayt*, 19 N. Y. 464, 467, per Grover J. "The rule of the common law was, that actions for torts die with the person, and could not be maintained by the personal representatives of the injured party, or against those of the wrongdoer. The statute has changed the law so far as property or relative rights are affected by the wrongful act. The R. S. of N. Y. (v. 2, p. 448, § 1) provide that, for wrongs done to the property rights, or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executors or administrators, in the same manner and with like effect in all respects as actions founded upon contracts. Section 2 provides that the preceding section shall not extend to actions for slander or libel, or to actions for assault and battery, or false imprisonment, nor to actions on the case for personal injuries to the plaintiff, or to the person of the testator or intestate of any executor or administrator. The exceptions contained in § 2 manifest the intention of the legislature, that all other actions founded upon tort should

survive." *Byxhie v. Wood*, 24 N. Y. 607, 611, per Gould J. "But, conceding that a tort is one of the elements that go to make up this cause of action, it will be found to be assignable. It will be seen to be of that class of torts the right of action for which would survive to the personal representatives of the claimant, and the power to assign and to transmit to personal representatives are convertible propositions." *Graves v. Spier*, 58 Barb. 849, 886, per Johnson J. "All the cases agree that it [the cause of action] is assignable, if the cause of action survives and may be maintained by or against the personal representatives of the parties to the transaction. We have seen that a cause of action like the one before us does so survive." *Butler v. N. Y. & Erie R. R.*, 22 Barb. 110, 112, per Mason J. "On the other hand, when the injury affects the estate rather than the person, when the action is brought for damages to the estate, and not for injury to the person, personal feelings, or character, the right of action can be bought and sold. Such a right of action upon the death, bankruptcy, or insolvency of the party injured passes to the executor or assignee as a part of his assets, because it affects his estate, and not his personal rights. . . . Mere personal torts which die with the person, such as slander, assault and battery, false imprisonment, seduction, and the like, are not assignable; but torts for taking and converting personal property, or for injury to personal property, and it seems, generally, all such rights of action for a tort as would survive to the personal representative of the party, may be assigned so as to pass an interest to the assignee, which he can assert in his own name in a civil action under the code, as he formerly might do in the name of the

therefore, by which to judge of the assignability of things in action, is to ascertain whether the demand survives upon the decease of the party, or dies with him. If all things in action are separated into two classes by this line of division, those embraced in the first class are assignable, and those which fall into the second are not. In the first class are all claims arising from the breach of contracts, with certain well defined exceptions, and those arising from torts directly to real or personal property, and frauds, deceits, and other wrongs by which an estate, real or personal, is injured, diminished, or damaged. In the second class

assignor at law." *Zabriskie v. Smith*, 18 N. Y. 822, 838, per Denio J. "The maxim of the common law is, '*actio personalis moritur cum persona*.'" This principle was not originally applied to causes of action growing out of the breach of a contract. They were parcel of the personal estate in reference to which the administrator or executor represents the person of the deceased, and is in law his assignee. But, as to this class of rights of action, late cases have somewhat qualified the rule: and it is now well settled that an executor or administrator cannot maintain an action upon an express or implied promise to the deceased, when the damage consists entirely of the personal sufferings of the deceased, whether mental or corporeal. Actions for the breach of a promise of marriage, for unskilfulness of medical practitioners contrary to their implied undertaking, the imprisonment of a party on account of the neglect of his attorney to perform his professional engagements, fall under this head, being considered as virtually actions for injuries to the person. (*Chamberlain v. Williamson*, 2 M. & S. 408). . . . But all actions *ex delicto* were governed by the maxim," until statutes *temp.* Edw. III. allowed executors and administrators to bring trespass *de bonis asportatis* when the taking was in the lifetime of the deceased. "These statutes have been greatly extended by an equitable construction (*Williams on Executors*, Vol. 1, p. 670); but I do not find that an action on the case for a deceit has ever been considered as within the purview of these statutes. . . . If it be true that the executors and administrators are the testator's assignees,

it is fair to assume that they take whatever of a personal nature the deceased had which was capable of assignment; and thus the power to assign and to transmit to personal representatives are convertible propositions. . . . Any interest to which the personal representatives of a decedent would not succeed is not the subject of an assignment *inter vivos*." Although the principle laid down by the learned judge in this opinion was correct, yet it is evident that he entirely overlooked the New York statute, which defines the causes of action which survive. Judge Denio's oversight of this statute is pointed out in subsequent cases in the same court. *Weire v. Davenport*, 11 Iowa, 49, 52, per Wright J. "It is contended that the liability of the city was for a tort, and that this could not be assigned. This was true at the common law, so far at least that the right of action for such an injury could not be transferred. What change the code has made in this respect we need not stop to inquire, for the reason that we entertain no doubt that such a liability may be sold and transferred. It may be sold just as a horse or any other property may be, and the title passes as completely. . . . The code has not narrowed the assignability of claims. Whatever could be assigned before may be still, and some claims are made assignable which before were not." *Tyson v. McGuineas*, 25 Wisc. 656, per Cole J. "It would seem generally that all such rights of action for torts as would survive to the personal representatives may be assigned so as to pass an interest to the assignee which he can now assert in his own name."

are all torts to the person or character when the injury and damage are confined to the body or the feelings, and those contracts, generally, though not always, implied, the breach of which produces only direct injury and damage, bodily or mental, to the person; and contracts, so long as they are executory, which stipulate solely for the special personal services, knowledge, and skill of a contracting party. Among the instances of the first of these two classes are the breach of a promise of marriage, injuries done by the want of skill of a medical practitioner contrary to his implied undertaking, and the like.¹ In most of these cases, and probably all except the promise of marriage, the wrong-doer might, under the old practice, have been sued in an action on the case for a neglect of his duty, as well as in assumpsit for a breach of his implied undertaking; and it is thus plain that this exception to the general doctrine under consideration is more apparent than real, for it rests entirely upon the fiction of regarding a certain transaction as a contract, when in fact no contract of the sort supposed was made.

§ 148. As a result of these general principles it is fully established that a right of action to recover damages for the wrongful taking and carrying away, or the wrongful conversion of personal property, is assignable.² In the same manner a demand for compensation arising from injuries to land, whether done directly and with force, or the result of negligence, may be assigned; ³ also demands arising from injuries to personal property, either in the form of trespasses with violence or of wrongs done through negligence and want of skill,—as, for example, a claim against a railroad company for carelessly running over and killing cattle by means of its trains.⁴ An illustration of the rights of action for

¹ *Zabriskie v. Smith*, 13 N. Y. 333, per Dealo J.; *Chamberlain v. Williamson*, 2 M. & S. 408; *Meech v. Stoner*, 19 N. Y. 23, per Comstock J.; *Wade v. Kalbfleisch*, 68 N. Y. 282.

² *McKee v. Judd*, 12 N. Y. 622; *Sherman v. Elder*, 24 N. Y. 381; *Hawk v. Thorne*, 54 Barb. 164; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Grocers Nat. Bank v. Clark*, 48 Barb. 26 (a claim for the fraudulent misapplication of funds by an officer of a bank); *Smith v. Kennett*, 18 Mo. 164; *Lazard v. Wheeler*, 22 Cal. 139; *Tyson v. McGuiness*, 25 Wisc. 656.

³ *Hall v. Cincinnati, &c. R. R.*, 1

Disney, 58; *Weire v. Davenport*, 11 Iowa, 49; *More v. Massini*, 32 Cal. 590; *Haight v. Green*, 19 Cal. 113. In these cases the decision was put expressly upon the ground that claims of the kind in question having been, by statutes of the respective States, made to survive, they were therefore assignable. A claim of damages for waste against a tenant. *Rutherford v. Aiken*, 3 N. Y. Sup. Ct. 60.

⁴ *Butler v. N. Y. & Erie R. R.*, 22 Barb. 110. See *McArthur v. Green Bay, &c. Canal Co.*, 34 Wisc. 139, 152, 153, per Lyon, J.

negligent injuries to land which are assignable, is that resulting from the setting on fire and burning up of grass, hay, and fences by coals carelessly dropped from passing engines.¹ Falling under the same principle is the case of a claim against a common carrier for a breach of his contract or duty in failing to deliver the goods at all, or in injuring them while on the transit. This is a very plain case, for at the common law the injured party might sue in assumpsit upon the carrier's promise express or implied, or in case upon his general duty.² The same is true of a demand in favor of a guest against an innkeeper, and, in fact, in favor of any bailor against his bailee for a breach of the latter's duty whereby the property bailed is lost, destroyed, or injured.³

§ 149. The following are additional instances of assignable rights of action arising from injuries done to property through the negligence or unskilfulness of the wrong-doer; against a person who had contracted with the State to keep a navigable canal in repair, for an injury done to a boat by means of an obstruction carelessly suffered to remain in the water-way; ⁴ against a sheriff for neglecting to arrest a defendant upon a body execution issued to him; ⁵ against a bank for neglecting to make a proper demand of payment of a note left with it for collection, and to take other steps necessary to charge the indorsers, whereby through the insolvency of the maker the debt was lost.⁶ Even the claim, under the statute, of a next of kin, for damages caused by the wrongful killing a person, is assignable; the statute makes the demand assets of the estate so far as the distributees are concerned, although not generally, and it is thus, by virtue of the statute, a property and not a mere personal right.⁷

§ 150. The same doctrine is applied to claims growing out of fraud and false representations, if the deceit is practised in some transaction relating to the buying, selling, or other dealing with

¹ *Fried v. N. Y. Cent. R. R.*, 25 How. Pr. R. 285.

² *Waldron v. Willard*, 17 N. Y. 466, in which the original owner simply assigned "all his interest in the goods." *Merrill v. Grinnell*, 30 N. Y. 694.

³ *Stanton v. Leland*, 4 E. D. Smith, 88; *Merrick v. Brainard*, 88 Barb. 674.

⁴ *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648.

⁵ *Dinenny v. Fay*, 38 Barb. 18. The

demand was held assignable because the wrong was done to the property rights or interests of the assignor, and the cause of action would survive. It was such a wrong, because taking the body of the debtor in execution is a satisfaction of the judgment.

⁶ *Ayrault v. Pacific Bank*, 6 Robt. 387.

⁷ *Quin v. Moore*, 15 N. Y. 432.

real or personal property, or if it be made in a contract by which real or personal property is to be acquired or transferred, or if it be the basis of or inducement to any act which results in a change of right relating to property. Of course, any fraud or false representation which merely affected personal relations, or was the basis or occasion of any change in purely personal status or condition, independent of and not connected with property, would not give rise to a cause of action which survives and is assignable. In accordance with the rule thus stated, a demand for damages arising from false representations, or from fraud of any kind, in the sale and purchase of land, would survive and may be assigned; and the same is true in respect to a sale of goods.¹ And a claim to recover money or other personal property which the defendant had obtained or procured to be transferred to him by fraud, is assignable.² The right of action given by statute to recover back money lost in gaming is assignable;³ and also a judgment rendered of damages for the commission of any tort whatsoever; for, although the tort itself may have been purely personal, it is completely merged in the judgment which is, by a very ancient conception of the law still left existing, regarded as "a contract of record."⁴

§ 151. The following are examples of demands arising out of some special forms of contracts, and of special rights and interests analogous to if not technically things in action, which have been held assignable. In reference to the contracts specified, the only possible doubt which could be suggested was, whether they did not fall within the class of agreements purely personal in their nature, the right of action arising from which does not survive. A contract entered into by a private person with the prison authorities of the State, for the hiring of the services of a stipulated number of convicts at a particular State prison, to be employed in a certain occupation, was held assignable by the

¹ *Haight v. Hayt*, 19 N. Y. 464; *Graves v. Spier*, 58 Barb. 349; *Johnston v. Bennett*, 5 Abb. Pr. (N. S.) 331; *Woodbury v. Deloss*, 65 Barb. 561.

² *Byxhie v. Wood*, 24 N. Y. 607, 609; *Grocers Nat. Bank v. Clark*, 48 Barb. 26. In the first of these cases, *Zabriskie v. Smith*, 13 N. Y. 322, was distinguished, and the correctness of the decision was questioned because the court overlooked

the provision of the N. Y. R. S. (Vol. 2, p. 447, §§ 1, 2), which determine what rights of action survive and what do not.

³ *Meech v. Stoner*, 19 N. Y. 26; *McDougall v. Walling*, 48 Barb. 364; *Hendrickson v. Beers*, 6 Bosw. 639. *Contra*, *Weyburn v. White*, 22 Barb. 82, which is overruled by the later cases.

⁴ *Charles v. Haskins*, 11 Iowa, 329.

New York Court of Appeals. The agreement was not a stipulation for the personal services of the contractor, nor was he in a position of any public or personal trust or confidence, and the State officials having no claim upon *his individual acts* in preference to those of another, his interest could be transferred.¹ A contract of guaranty may be assigned;² and the right to a trademark;³ a widow's right to dower before admeasurement;⁴ the claim of a rightful officer against an intruder for the fees of the office received by the latter during the period of his occupancy;⁵ a sheriff's demand against an attorney for his fees in executing process;⁶ bonds taken by sheriffs and other officers in the progress of an action for the protection of a party thereto.⁷ An assignment of demands in expectancy is valid in equity as an agreement, and becomes an absolute transfer as soon as the demands arise and come into existence in favor of the assignor; and the assignment of part of a demand of which notice is given to the debtor is also good in equity, so that when separate portions are thus assigned to different persons, each assignee may maintain an action to recover the part transferred to him.⁸

§ 152. *Second: What things in action are not assignable.* The general principle which determines what claims, demands, and rights of action are not assignable, has been already fully stated in the text and in the quotations placed in the notes, and need not be repeated. It is simply necessary to ascertain, and the sole practical difficulty consists in ascertaining, what particular torts are injuries, bodily or mental, to the person only, or to the reputation, and what particular contracts are purely personal, so

¹ Horner v. Wood, 28 N. Y. 350.

² Small v. Sloan, 1 Bosw. 852.

³ Lockwood v. Bostwick, 2 Daly, 521.

⁴ Strong v. Clem, 12 Ind. 87.

⁵ Platt v. Stout, 14 Abb. Pr. 178.

⁶ Birbeck v. Stafford, 14 Abb. Pr. 285.

⁷ Moorman v. Collier, 82 Iowa, 188.

⁸ Field v. The Mayor, &c. of New York, 6 N. Y. 179. This action was commenced in equity before the code. One Bull had various contracts with the city of New York for printing, and was engaged in their performance by printing for the city. He assigned to G., and G. to the plaintiff, whatever might become due thereon to the amount of \$1500, after two certain other prior similar assignments had

been paid, and the plaintiff notified the city of the transfer. Bull proceeded with his work, and amounts became due to him, which satisfied the two prior assignments, and were more than enough to satisfy the plaintiff's demand. The Court of Appeals held in accordance with the rules stated in the text, and also that payment by the debtor—the city—to the original creditor,—Bull,—after notice of the assignment, is no defence to an action by the assignee. Although this suit, commenced under the old system, was in equity, the doctrine recognized by it must be applicable to a civil action under the code. See Bliss v. Lawrence, 58 N. Y. 442.

that the right to enforce them, or the liability springing from them, does not survive after the death of a contracting party.¹ The following cases are given as illustrations of such wrongs and of such contracts. A cause of action for injuries to the person caused by negligence is not assignable, even though the injured party has an election whether to base his demand upon the tort or to sue upon a contract express or implied; for example, a right of action against a railroad corporation for injuries caused by negligence to the person of a passenger. If the right is regarded as arising from a breach of the contract to carry safely, such contract itself falls within the class mentioned above, since its violation causes mere bodily or mental injuries to the person, and not in any manner to property. The quality of assignability cannot be impressed upon a demand by changing the theory of the action brought upon it.² A verdict rendered in an action for a personal tort is not assignable; the verdict does not change the nature of the right; it liquidates the amount of the damages, but there is no debt or claim which can pass by assignment until a judgment is recovered.³ It was decided by the New York Court of Appeals, in a well considered case, that a claim of damages for falsely and fraudulently representing a person to be solvent, by which the party to whom the representations were made was induced to sell goods to such person on credit, and thereby lost the same or their price, was not assignable. This case was distinguished from that in which the wrong-doer by false statements procures goods to be sold to himself on credit, and it was said that the gist of the action was a pure deceit, a tort to the person and not an injury to property rights.⁴ Although *Zabriskie v. Smith* has not been expressly overruled, its reasoning has been disapproved, and it is at least very much shaken. It is conceded that the court, in rendering its judgment, overlooked a

¹ A non-negotiable note, payable in work and labor, is assignable. *Schnier v. Fay*, 12 Kans. 184; *Williams v. Norton*, 3 Kans. 295.

² *Purple v. Hudson River R. R.*, 4 Duer, 74; s. c., 1 Abb. Pr. 88; *Hodgman v. Western R. R.*, 7 How. Pr. 492. A claim for damages resulting from a malicious prosecution and abuse of legal process was held not assignable, although the complaint alleged injury to the assignor's business and loss of property as a

consequence. The cause of action was held to be for a mere *personal* tort, while the other averments were of special damages. *Noonan v. Orton*, 84 Wisc. 259.

³ *Brooks v. Hanford*, 15 Abb. Pr. 842; *Crouch v. Gridley*, 6 Hill, 250; *Kellogg v. Schuyler*, 2 Denio, 73; *Lawrence v. Martin*, 22 Cal. 178 (verdict in an action for malicious prosecution).

⁴ *Zabriskie v. Smith*, 18 N. Y. 822; *Hyslop v. Randall*, 4 Duer, 660 (S. T.)

section of the statute which virtually enumerates the classes of demands arising from torts which cannot be assigned, and which enumeration does not include the demand in question. As the cases decided subsequently are quite inconsistent with the conclusion reached in this case, it may be regarded as substantially overruled; and, applying the doctrine of those authorities, it would seem that the right of action for such a deceit is assignable.¹

§ 153. It has been held in one or two instances that a demand against a common carrier for the loss of goods intrusted to him was not assignable;² nor the cause of action given by statute to recover back money lost in gaming;³ but these decisions are clearly wrong, and have been many times overruled, as is seen by authorities cited in former paragraphs. A wife's inchoate right of dower is not the subject of grant or of assignment.⁴ The following are illustrations of personal interests or rights which cannot be assigned: the right given to the debtor by statute to have bills, notes, and other securities avoided or cancelled on the ground of usury;⁵ the right held by a covenantee to set aside, on account of fraud, a release which he had given of a covenant in his favor;⁶ the right of a grantor to avoid his conveyance on

¹ In *Haight v. Hayt*, 19 N. Y. 464, 467, Grover J., after quoting the N. Y. R. S. v. 2, p. 448, §§ 1 and 2,—the first of which sections declares that demands arising from torts to property rights shall survive, and the second of which provides that the first shall not extend to "actions for slander, for libel, or to actions for assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate,"—adds: "The exceptions contained in the second section manifest the intention of the legislature that all other actions founded upon tort should survive." And Judge Denio, who had himself delivered the opinion in *Zabriskie v. Smith*, said in this same case, in reference to these sections of the statute: "The exception in § 2 shows, if there was otherwise any doubt, that the prior section was intended to embrace the case." This reasoning and these statutory provisions are entirely inconsistent with the decision made in *Zabriskie v. Smith*. Again, in *Byxbie v. Wood*, 24 N. Y. 610, Gould J., speaking of the same case, after

commenting upon it and distinguishing it from the one before the court, remarked: "As to that decision, it may be advisable to see how fully it accords with the R. S. vol. 2, p. 447, §§ 1 and 2." Finally, in *Johnston v. Bennett*, 5 Abb. Pr. (N. S.) 831, 332, Jones J. said: "When *Zabriskie v. Smith* was decided, these provisions of the statute (§§ 1, 2, *supra*) do not appear to have been called to the attention of the learned judge who delivered the opinion." On the other hand, in *Graves v. Spier*, 58 Barb. 349, Mr. Justice Johnson in his elaborate opinion seems to recognize *Zabriskie v. Smith* as good law; at least he carefully discriminates it from the one then under consideration, points out the differences, and does not suggest a doubt as to its correctness.

² *Thurman v. Welles*, 18 Barb. 500.

³ *Weyburn v. White*, 22 Barb. 82.

⁴ *Moore v. Mayor & Co. of New York*, 8 N. Y. 110, per Gardiner J.

⁵ *Bullard v. Raynor*, 30 N. Y. 197; *Boughton v. Smith*, 26 Barb. 635.

⁶ *Milwaukee & Minn. R. R. v. Milwaukee & West. R. R.*, 20 Wisc. 174.

the ground of fraud;¹ and the vendor's right of lien on land sold, for the purchase price thereof.²

SECTION FOURTH.

THE EFFECT OF AN ASSIGNMENT OF A THING IN ACTION UPON THE DEFENCES THERETO.

§ 154. The statutory provision found in the various State codes which relates to the subject-matter of this section is the following: "In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defence existing at the time of or before notice of the assignment; but this section shall not apply to [negotiable bonds, *Ohio, Kansas, Nebraska*] negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration, before due."³ In Ohio, Kansas, Nebraska, and Washington, the phraseology is slightly different. It reads: "The action of the assignee shall be without prejudice to any set-off or other defence now allowed."⁴ The consideration of the topics embraced in this provision should, in a strictly scientific method, form a part of the general subject of Defences, and might properly be postponed until this portion of the work is reached; but I have chosen to pursue the order of the codes themselves, which is the same in all the States, rather than to adopt one more theoretically correct, yet perhaps not more practically advantageous.

§ 155. It is important that the defences which this clause admits, should be carefully distinguished from the counter-claim subsequently provided for by the statute. This section speaks of *defences* which, as they ask no affirmative relief, and simply prevent the plaintiff from succeeding, may be made available against an assignee as well as against the original creditor. The counter-claim is more than a defence: it assumes a right of

¹ *Smith v. Harris*, 48 Mo. 567.

² *Baum v. Grigsby*, 21 Cal. 172; *Lewis v. Covillaud*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227.

³ New York, § 112; Minnesota, § 27; California, § 368; Wisconsin, ch. 122, § 18; Indiana, § 6; Florida, § 68; Kentucky, § 31; South Carolina, § 135; Oregon,

§§ 28, 382; Nevada, § 5; Dacotah, § 65; Iowa, § 2546 (slightly altered); North Carolina, § 55; Idaho, § 5; Montana, § 5; Washington, § 8; Wyoming, § 83; Arizona, § 5.

⁴ Ohio, § 26; Kansas, § 27; Nebraska, § 29; Washington, § 8, slightly varied.

action against and demands a recovery of affirmative relief from the plaintiff in the suit, and is, therefore, impossible as against an assignee suing, if it existed against the assignor. The proposition here stated is very simple and plain, and yet the defences permitted against the assignee by this section have been sometimes confounded with counter-claims, and that even by judges and courts.

§ 156. The section quoted above, and which is substantially the same in all the States, does not change the then existing law as to defences under the circumstances mentioned in it. It was not intended to alter the substantial rights of the parties, but only to introduce such modifications into the modes of protecting them as were rendered necessary by the provisions of the preceding section requiring the real party in interest in most cases to be the plaintiff. Taking the two sections together, the plain interpretation of them is: The assignee of a thing in action must sue upon it in his own name, but this change in the practice shall not work any alteration of the actual rights of the parties; the defendants are still entitled to the same defences against the assignee who sues, which they would have had if the former rule had continued to prevail, and the action had been brought in the name of the assignor, but to no other or different defences. In other words, the section must be interpreted as though it read as follows: "In the case of the assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defence [now allowed or] existing at the time of or before notice of the assignment, which would have been available to the defendant, had the action been brought in the name of the assignor." This construction is now firmly and universally established.¹

§ 157. As the pre-existing rule is thus re-affirmed, a full discussion of the statutory provision requires an examination and statement of that rule itself. In the first place, the general doctrine is elementary that the purchaser of any thing in action, not negotiable, takes the interest purchased subject to all the defences legal and equitable of the debtor who issued the obligation or security. That is, when the original debtor, the obligor on the bond, or the promisor, in whatever form his promise is

¹ Beckwith v. Union Bank, 9 N. Y. 211, 212, per Johnson J.; Myers v. Davis, 22 N. Y. 489, 490, per Denio J.

made, if it is not negotiable, is sued by the assignee, the defences legal and equitable which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail to him against the substituted creditor.¹ This doctrine has been applied to all kinds of defences as well as to set-off, and to all forms of contract not negotiable: as, for example, in an action on a bond and mortgage by the assignee, the defence that the bond and the mortgage collateral thereto were given on consideration that the obligee should perform certain covenants contained in an agreement between the parties which was set out, and that he had wholly failed to perform the same, was held good;² in an action brought on a warehouseman's receipt, the same being held not negotiable;³ in an action by an assignee for the benefit of creditors;⁴ and in an action to compel a specific performance, brought by the assignee of the vendee, under a contract for the sale of lands, although the vendee was in possession.⁵

§ 158. The doctrine is not confined, however, in its operation to the case of the debtor—the promisor in the thing in action—setting up a defence to an action brought by an assignee upon the demand itself to enforce the collection or performance thereof; it applies also to the second and subsequent assignees of a non-negotiable thing in action, although transferred to the purchaser and holder for full value, and without notice, if there were equities subsisting between the original assignor and his immediate assignee in favor of the former. If the owner and holder of a thing in action not negotiable transfers it to an assignee upon condition, or subject to any reservations or claims in favor of the transferor, although the instrument of assignment be absolute on its face, this immediate assignee, holding in it a qualified and

¹ *Ingraham v. Disbrough*, 47 N. Y. 421; *Andrews v. Gillespie*, 47 N. Y. 487; *Bush v. Lathrop*, 22 N. Y. 535, 538, per Denio J.; *Blydenburgh v. Thayer*, 3 Keyes, 293; *Callanan v. Edwards*, 32 N. Y. 483, 486, per Wright J., who thus states the rule: "An assignee of a chose in action not negotiable takes the thing assigned, subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time notice was given of it, when there is an interval between the execution of the transfer and

the notice." *Commercial Bank v. Colt*, 15 Barb. 506; *Ainslie v. Boynton*, 2 Barb. 258; *Wood v. Perry*, 1 Barb. 114; *Western Bank v. Sherwood*, 29 Barb. 383; *Reeves v. Kimball*, 40 N. Y. 299.

² *Western Bank v. Sherwood*, 29 Barb. 388.

³ *Commercial Bank v. Colt*, 15 Barb. 506.

⁴ *Maas v. Goodman*, 2 Hilt. 275; *Marine Bank v. Jauncey*, 1 Barb. 486.

⁵ *Reeves v. Kimball*, 40 N. Y. 299.

limited property and interest, cannot convey a greater property and interest than he himself holds ; and if he assumes to convey it to a second assignee by a transfer absolute in form, and for a full consideration, and without any notice on the part of such purchaser of a defect in the title, this second assignee nevertheless takes it subject to all the equities, claims, and rights of the original owner and first assignor. The doctrine of so-called "*latent equities*," which has received some judicial support,—that is, the doctrine that the equities of the original assignor, under the circumstances thus stated, are latent and cannot prevail against the title of the second assignee,—is unsound ; it is an attempt to extend the peculiar qualities of negotiable paper to things in action not negotiable, and destroys the fundamental distinction between the two classes of negotiable and non-negotiable demands.¹

§ 159. A few illustrations of this rule will serve to show its true meaning, and the extent of its application. The holder of a bond and mortgage for \$1400 assigned and delivered them to secure an indebtedness of \$270, the assignee giving back a written undertaking to return the same upon being paid that amount. This assignee afterwards transferred the securities to a second, and he to a third assignee, the latter paying full value, and having no notice of any outstanding claims or defects in the title. The original owner tendered to this assignee the \$270 and interest thereon, and demanded a return of the bond and mortgage. Upon refusal, he brought an action to compel such return ; and it was held by the New York Court of Appeals, after a most exhaustive discussion, that he should recover.²

¹ *Bush v. Lathrop*, 22 N. Y. 535 ; *Anderson v. Nicholas*, 28 N. Y. 600, approved by Woodruff J. in *Reeves v. Kimball*, 40 N. Y. 811 ; *Mason v. Lord*, 40 N. Y. 476, 487, per Daniels J. ; *Williams v. Thorn*, 11 Paige, 459 ; *McNeil v. Tenth Nat. Bank*, 55 Barb. 59, 68 ; *Schafer v. Reilly*, 50 N. Y. 67 ; *Mangles v. Dixon*, 3 H. of L. Cas. 702.

² *Bush v. Lathrop*, 22 N. Y. 535. The opinion of Denio J. is a most able review of all the authorities which seem to sustain the doctrine that certain so-called "*latent equities*" are not protected against an assignment. He shows that all the expressions of judicial opinion to that

effect are *obiter dicta*, while a large number of direct decisions necessarily involving the question are opposed to the doctrine. I would add that the course of adjudications in reference to the sale of goods and chattels by conditional vendees who have been put in possession, and who have been held unable to transfer an absolute title to *bona fide* purchasers for value, fully supports the reasoning and conclusions of Judge Denio. There is no possible ground of valid distinction between the transfer of a thing in action when the transferor appears to be clothed with the complete ownership, but is actually

Certificates of stock being wrongfully taken from the owner and sold to the defendant, it was held that the latter acquired no better or higher title than that held by his immediate transferrer, — the one who wrongfully converted the stock, — and that the original owner could recover the value of the securities with interest; but the decision was partly placed upon the special circumstances of the transfer, which deprived the defendant of the character and position of a *bona fide* purchaser.¹ The lessee of premises assigned the lease by an instrument valid on the face, but the transfer was in fact given as security for an usurious loan made to him by the assignee. This lease was afterwards transferred by the assignee, passed through divers hands, and was finally purchased by the defendant, who knew that the first transfer was intended as a security for a loan, but who had no knowledge nor notice of the usurious taint which affected the loan, and who paid full value as the consideration of the transfer to himself. Subsequent to the original assignment by the lessee, but before the transfer to the defendant, the plaintiffs recovered a judgment against such lessee, which was regularly entered and docketed, and the lessee's interest in the premises leased and in the lease itself was sold on execution, bought in by the plaintiffs, and a sheriff's deed of such interest was delivered to them, which deed, however, was executed after the assignment to the defendant. The plaintiffs thereupon commenced an action to recover possession of the leased premises, and to avoid the transfer of the lease to the defendant on account of the usury which affected and nullified the first assignment

not, and the transfer of a chattel by a person similarly situated and having all the outward *indicia* of perfect title. See *Ballard v. Burgett*, 40 N. Y. 814, and the cases cited.

¹ *Anderson v. Nicholas*, 28 N. Y. 600. On account of the peculiar facts referred to in the text, which prevented the defendant from relying upon the defence of *bona fides*, this case cannot be regarded as a direct authority for the doctrine of the text. One of the judges, Davies J., bases his judgment entirely upon the ground that the assignee could under no circumstances acquire a better title to a non-negotiable thing in action than that possessed by his immediate assignor, and

made no allusion to the defendant's want of good faith. Another, Denio J., dwelt upon the facts which showed the bad faith, but was, at the same time, very careful to protest against any inference from his course of argument to the effect that, if the purchase had been in good faith, the assignee would have been protected. The third judge who delivered an opinion, Hogeboom J., seems to have adopted the view of the case taken by Davies J. On the whole, although the *fact of bad faith* was an element in the decision, the doctrine laid down applies to all cases of transfer, those in good faith as well as those in bad faith.

made by the lessee to his immediate assignee. The New York Court of Appeals, following the doctrine of the decisions quoted above, held that the action could be maintained; that the lessee might have set aside the transfer from himself on account of the usury which tainted it; that the subsequent assignees, including the defendant, succeeded to all the rights, and were subjected to all the disabilities possessed by and imposed upon the person who transferred the security to them, — the first assignee; and, finally, that the judgment creditors of the lessee were clothed with his rights and powers in the matter.¹

§ 160. The principle thus settled, and the cases which support it, are entirely consistent with another doctrine that has lately been approved and established by the same distinguished court, namely, the doctrine of estoppel as applied to the transfer of certain species of things in action which, in the customary practice of business men, have acquired a quasi negotiable character. The doctrine, as thus invoked by the court, may be stated as follows: The owner of certain kinds of things in action not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character as a matter of fact, may assign or part with them for a special purpose, and at the same time may clothe the assignee or person to whom they have been delivered with such *apparent indicia* of title, and instruments of complete ownership over them, and power to dispose of them, as to *estop* himself from setting up against a second assignee to whom the securities have been transferred in good faith and for value, the fact that the title of the first assignee or holder was not absolute and perfect. After some conflict of opinion in the lower courts, the New York Court of Appeals has recently applied the foregoing doctrine to the customary mode of dealing with certificates of stock. It holds that if the owner of such stock certificates assigns them as collateral security, or pledges them, or puts them into the hands of another for any purpose, and accompanies the delivery by a blank assignment

¹ *Mason v. Lord*, 40 N. Y. 476, 487. The doctrine is directly sustained in the following more recent cases: *Schafer v. Reilly*, 50 N. Y. 61, 67; *Reeves v. Kimball*, 40 N. Y. 299; *Ingraham v. Disborough*, 47 N. Y. 421; *Cutts v. Guild*, 57 N. Y. 229, 232, 233. In the last case *Bush v. Lathrop* is reaffirmed, and its principle pronounced to be "well settled." The result of these authorities is to limit the decision in *Moore v. Metropolitan Nat. Bank*, *infra*, and to confine it to the doctrine as laid down in *McNeil v. Tenth Nat. Bank*, *infra*.

and power of attorney to transfer the same in the usual form, signed by himself, and this assignee or pledgee wrongfully sells them to an innocent purchaser for value in the regular course of business, such original owner is *estopped* from asserting, as against this purchaser in good faith, his own higher title and the want of actual title and authority in his own immediate assignee or pledgee. This principle, thus applied to the peculiar state of facts described, and to the particular kind of securities, is in no respect necessarily antagonistic to the general doctrine in relation to things in action before stated in the text. The court rested its decision exclusively upon the form of the blank assignment and power of attorney executed by the assignor and delivered to the assignee, which clothed him with all the *apparent* rights of ownership which are recognized by business men in their usual course of dealing with like securities, as sufficient to confer a complete title and power of disposition upon the assignee. The decision was nothing more than the application of the doctrine of estoppel in circumstances to which it had not before been applied.¹

¹ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, reversing S. C. 55 Barb. 59. The Supreme Court held (1) that certificates of stock were in no respect negotiable, and (2) the rule as laid down by Denio J. in *Bush v. Lathrop*. The law of estoppel was not invoked nor alluded to. In the Court of Appeals the doctrine of latent equities was discussed; the decision of the court in *Bush v. Lathrop*, and the reasoning of Mr. Justice Denio, were expressly recognized as correct, and as applicable to all cases in which the facts do not warrant the application of the principle of estoppel. Mr. Justice Rapallo, in his able judgment, does not discuss the rule in relation to things in action of all kinds; he confines himself exclusively to the particular species of security then before the court, — certificates of stock in stock corporations; and, while he does not claim for them absolute negotiability, he does in fact render them indirectly negotiable by means of the estoppel which arises upon dealing with them in the manner described, which is the mode universally prevalent among business men. In respect to the opinion of Denio J. he says (p. 339): "But in no part of his learned and exhaustive opinion does

he seek to apply its doctrine to shares in corporations or other personal property the legal title to which is capable of being transferred by assignment; and the free transmission from hand to hand is essential to the prosperity of a commercial people. The question of estoppel does not seem to have been considered in that case, and perhaps it would not have been appropriate." He expressly approves the rule frequently laid down as to chattels, and, while invoking the aid of estoppel, is very careful to state the narrow limits within which it may be used, and the kind of facts which are necessary to its use. He says (pp. 329, 330): "Simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property in case of an unauthorized disposition by the person so intrusted. (*Ballard v. Burgett*, 40 N. Y. 814.) The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give good title. But if the owner intrusts to another not merely

§ 161. This decision, and the rule which it establishes in reference to certificates of stock, are doubtless in the interests of modern business methods. For several years these certificates of stock, with an assignment in blank and a blank power of attorney to affect their surrender and transfer, have been practically regarded by business-men as negotiable instruments; they have been used, transferred from hand to hand, and assigned by delivery, in exactly the same manner as bills and notes payable to bearer, and millions of property are constantly ventured upon their use. It was a matter of absolute necessity that the courts should pronounce these securities *practically* negotiable; a contrary ruling would have interrupted and jeopardized the whole financial system of the country. It would have been well if the court had boldly met the question face to face, and had expressly held these securities to be negotiable to all intents and purposes. This course of decision would have produced no unexpected interference with other general doctrines, and it has a precedent in the acts of the American courts holding that municipal and corporation coupon bonds of the ordinary form are negotiable. As the court did not pursue this course, it accomplished the same purpose by resorting to the doctrine of estoppel; and I repeat, that when confined to these peculiar forms of securities which had been made practically negotiable by the course of business, the judgment and its *ratio decidendi* do not affect the general principle in relation to the transfer of things in action which has been stated and illustrated in preceding paragraphs. But the same court has, in a still later case, gone far beyond both the

the possession of the property, but also written evidence over his own signature of title thereto, and of an unconditional power of disposition over it, the case is vastly different." The following would seem to be the general rule as thus approved by the court: If the owner of a thing in action delivers it to an assignee for a special purpose, with a simple written assignment thereof, even though absolute on the face, this is not enough to raise the estoppel; but if, with this assignment, the owner gives a further writing containing "an unconditional power of disposition" over the thing in action, then the estoppel may be invoked. In *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616,

622, 623, the doctrine of estoppel was applied to the corporation itself whose stock had been transferred in good faith, and in the usual manner, to the plaintiff. *McNeil v. Tenth Nat. Bank*, *supra*, and *Leitch v. Wells*, 48 N. Y. 585, were held to be controlling; and *Ledwich v. McKim*, 58 N. Y. 307, was said not to conflict in any manner. It is decided in Nevada that certificates of stock in the ordinary form are not negotiable instruments, so that when such certificates had been stolen and transferred in the customary manner to a *bona fide* purchaser for value, the latter acquired no title as against the owner. *Bercich v. Marxe* 9 Nev. 812.

conclusions and the reasoning of its judgment in *McNeil v. Tenth National Bank*, and has virtually obliterated the distinction between negotiable and non-negotiable things in action, at least so far as the relations between assignors and assignees of them are concerned. The doctrine of estoppel, which had been used to protect the customary modes of transacting business with certificates of stock, is now extended to all species of things in action, and the effect of an estoppel is declared to be produced from a *mere assignment of the security, absolute on its face, executed by the original owner, and delivered to his assignee*. In short, whenever the owner of a non-negotiable thing in action delivers the same to another person, and accompanies the delivery by an assignment thereof, absolute on its face, and this person transfers the same to a purchaser for value who relies upon the apparent ownership created by the written assignment, and has no notice of any thing limiting that apparent title, the original owner is estopped from asserting as against such purchaser any equities existing between himself and his immediate assignee, and any interest or property in the security which he may have, notwithstanding the written transfer. The Court of Appeals, in reaching this conclusion, expressly overrules the decision made upon the facts involved in *Bush v. Lathrop*; but at the same time declares that it does not intend to shake the general doctrine controlling the transfer of non-negotiable things in action upon which that decision is based. It is plain, however, that the ancient and, as it was supposed, well-settled doctrine is substantially abrogated by this last application of the principle of estoppel. The estoppel is made to arise from a mere naked transfer in writing, absolute in form; the *rationale* of the decision is the apparent ownership thus bestowed upon the assignee; and these elements of the judgment will clearly apply to so many cases that things in action are practically rendered negotiable in their nature as between the series of successive holders, — the assignors and assignees. This point being attained, it will be a short and easy step to apply the doctrine of estoppel to the debtor himself, — the obligor or promisor who utters the security. If negotiability is produced by means of estoppel between the assignor and assignee, arising from the fact and form of a transfer from one to another, by parity of reasoning the debtor may be regarded as estopped by the fact and form of his issuing the undertaking and delivering

it to the first holder, and thus creating an apparent liability against himself. In short, there is exactly the same reason for holding the debtor estopped from denying his liability upon a written instrument which apparently creates an absolute liability, when that instrument has passed into the hands of a purchaser who has no notice of the actual relations between the original parties, as for holding an assignor estopped from denying the completeness of a transfer made by him absolute on the face. This result, if reached, would render all things in action practically negotiable.¹

§ 162. As the result of adjudications of which the foregoing are examples, the rules of the law as established independently of the codes may be summed up in the following manner: (1) All defences, either legal or equitable, which existed in favor of the debtor himself against the original creditor at the time of the assignment, or of notice to him of the assignment, of a non-negotiable thing in action, avail to him against the assignee who seeks to enforce the demand against such debtor; (2) When the owner and holder of a non-negotiable thing in action transfers it to an assignee for a special purpose — such as security for a loan, and the like — by an assignment absolute on its face, but

¹ *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41. Moore, the owner of a certificate of indebtedness of \$10,000, delivered the same to Miller for a certain special purpose, but not intending to transfer any property therein; in fact, Miller was to procure the same to be discounted, and to account for the proceeds, or else return the certificate. Moore, however, gave Miller the following writing, indorsed on the instrument: "For value received, I hereby transfer, assign, and set over to Isaac Miller the within described amount, say ten thousand dollars. Levi Moore." Miller assigned the certificate to the defendant for value, who took it on the faith of this written assignment, without notice of the true relations between Moore and Miller. The action was brought to recover possession of the certificate. The court held, per Grover J. (pp. 46-49), that the case is controlled by that of *McNeil v. Tenth Nat. Bank*, and that the judgment in the latter is inconsistent with the reasoning of Denio J. in

Bush v. Lathrop, and with the decision made on the facts of that case. Grover J. does not allude to the careful distinction drawn by Rapallo J. between the circumstances of the two cases, nor his approval of the general doctrine and course of reasoning contained in Judge Denio's opinion. Nor does Judge Grover make the slightest allusion to the narrow limits placed by Rapallo J. upon the use of the estoppel; namely, to those cases in which the assignor, by a written instrument over his signature, confers not only the apparent title, but the unconditional power of disposition over the security. While the judgment of Rapallo J. in *McNeil v. Tenth Nat. Bank* was guarded and cautious, and eminently proper in respect to the peculiar class of securities, that of Grover J. is, I think, opposed to doctrines the most elementary, and can only produce confusion in a branch of the law which had been settled for generations.

as between himself and his assignee retains an interest in or claim upon the demand, and this assignee assumes to transfer the same absolutely to a second assignee who purchases in good faith without notice and for value, the first assignee in fact transfers no higher title than he possesses, and the second assignee takes the thing in action subject to the equities and claims of the original assignor; but (3) in the State of New York a modification of this second rule has been introduced in very recent decisions, and in pursuance thereof, if the original owner accompanies the delivery of the thing in action with a written assignment thereof absolute in form, and therefore apparently vesting the complete ownership in his immediate assignee, an innocent purchaser for value from the latter is protected against any claims, demands, or equities existing in favor of the first assignor; the latter is estopped from asserting his true right and property in the security. This modification, which was at first confined to certificates of stock transferred by means of the customary blank assignment and power of attorney, has been extended to all things in action.

§ 163. What construction has been put by the courts upon the provision of the codes embodying and reaffirming these general rules? I shall consider in the first place the effect of this provision upon the defence of set-off. No substantial change has been made in the rights of the several parties. The assignee takes the demand assigned subject to all the rights which the debtor had acquired prior to the assignment, or prior to the time when notice was given, if there was an interval between the execution of the transfer and the notice; but he cannot be prejudiced by *any* new dealings between the original parties after notice of the assignment has been given to the debtor. When two opposing debts exist in a perfect condition at the same time, either party may insist upon a set-off. If therefore the holder of such a claim already due and payable assign the same, and the debtor at the time of this transfer holds a similar claim against the assignor, which is also then due and payable, he may set off his debt against the demand in the hands of the assignee. If, however, the assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of set-off is destroyed by the mere fact of the assignment, and no notice thereof to him is necessary to produce that effect. The following

special rule also exists under the peculiar circumstances mentioned. If an insolvent holder of a claim not yet matured assigns the same before maturity, and the debtor at the time of this transfer holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected. This latter doctrine is based upon considerations of equity, and is intended to prevent one party from losing his own demand on account of the insolvency of his immediate debtor, and from being at the same time compelled to pay the debt originally due from himself to that insolvent. These three rules existed prior to the codes, and have not been changed by the provisions of the statute under consideration.¹

§ 164. The true extent and limitations of the doctrine will best be seen in its application to the facts of decided cases. On the 24th August, 1850, the firm of W. C. & A. A. Hunter, having on deposit in the Union Bank the sum of \$3,600, made a general assignment to one Beckwith. At the time the bank was holder of a bill of exchange which was indorsed by the firm, and had been discounted by the bank for them. This bill fell due on the 27th of August, and, not being paid, the amount of it was charged against the firm in their account by the bank. On the next day, the 28th, the assignee for the first time notified the bank of the

¹ *Beckwith v. Union Bank*, 9 N. Y. 211; *Myers v. Davis*, 22 N. Y. 489; *Martin v. Kunzmüller*, 87 N. Y. 396; *Blydenburgh v. Thayer*, 8 Keyes, 298; 84 How. Pr. 88; *Watt v. Mayor, &c.*, 1 Sandf. 28; *Wells v. Stewart*, 8 Barb. 40; *Ogden v. Prentice*, 83 Barb. 160; *Adams v. Rodarmel*, 19 Ind. 339; *Morrow's Assignees v. Bright*, 20 Mo. 298; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Roberts v. Carter*, 38 N. Y. 107; *Williams v. Brown*, 2 Keyes, 486; *Robinson v. Howes*, 20 N. Y. 84; *Maas v. Goodman*, 2 Hilt. 275; *Merrill v. Green*, 55 N. Y. 270, 274; *Lathrop v. Godfrey*, 6 N. Y. Sup. Ct. 96. The claim set up by the defendant must be a valid set-off. In an action by the assignee of a liquidated demand arising out of contract, — a debt, — the defendant cannot interpose a claim against the assignor for unliquidated damages resulting from the breach of a contract, and thus defeat or diminish the recovery. Such a

defence is not a counter-claim, and does not fall within the prior statutory description of set-off. *Frick v. White*, 57 N. Y. 108. Where the assignee of a judgment brought an action in the nature of a creditor's suit against the judgment debtor and others, to subject certain equities to the lien of the judgment, and the debtor interposed as a set-off a debt due himself from the assignor — the judgment creditor — at the time of the assignment, it was held, in Ohio, that the assignor was a necessary party, and, in his absence, the set-off could not be passed upon and allowed. *Gildersleeve v. Burrows*, 24 Ohio St. 204. When negotiable paper is transferred after maturity, the maker has the same right to avail himself of a claim against the assignor as a set-off that he would have if the demand assigned was not negotiable. *Norton v. Foster*, 12 Kans. 44, 47, 48; *Leavenson v. Lafontaine*, 8 Kans. 523, 528.

assignment, and demanded payment of the sum on deposit to the firm's credit, which was refused. The assignee brought a suit to recover the debt, and the bank set up the amount due on the bill of exchange as an offset. It was held by the Superior Court of New York City, and by the Court of Appeals, that the demand in favor of the bank could not be set off, as it was not an existing demand payable when the assignment was made; and that no notice was necessary by the assignee to protect himself against such a defence. Notice is only necessary against subsequent acts and dealings of the debtor with an assignor, which might prejudice the rights of the assignee, such as payment.¹ In March, 1855, the firm of Watrous & Lawrence made a general assignment to one Meyers, having before that time sold goods to the defendants on credit, the price of which did not become due and payable until September, 1855. In February of the same year W. & L. had ordered from the defendants a quantity of articles — patent churns — to be manufactured and delivered at a certain agreed price. There had been such mutual dealings between the parties before. In May, 1855, the defendants completed the churns, and tendered them to the assignee, who declined to receive them. The assignee brought an action for the price of the goods when it became due in September, and the defendants insisted upon the value of the churns as an offset. The defence of offset was rejected. The court held that the situation of the parties at the date of the assignment must determine the question, and unless a right of offset existed *then*, it could not arise afterwards. It did not exist then, because neither of the demands had matured; but it was enough that the defendants' claim was not yet

¹ *Beckwith v. Union Bank*, 9 N. Y. 211, 212. Johnson J. said: "Nor had the bank any lien on the deposit of the Hunters which would have prevented their drawing out the whole balance of cash to their credit on the 24th of August. This right passed to the plaintiff by the assignment; no notice was necessary to protect that right in the assignee, except only that, in default of notice, the bank might have so dealt as by its subsequent acts to have affected his rights." See, however, *Smith v. Fox*, 48 N. Y. 674, which was an action by an assignee for the benefit of the creditors of one R., a

private banker, brought on a note given by defendant to R., and transferred to the plaintiff. At the time of the assignment defendant had an amount of money on deposit with R., — more than sufficient to pay the note; and this demand was held to be a good set-off against the note, on the authority of *Smith v. Felton*, 43 N. Y. 419. The claim made against the defendant, and the demand set up by him, must both affect him in the same capacity; thus, when the defendant is sued for a personal debt, he cannot interpose as a set-off a demand due him as an executor. *Barlow v. Myers*, 6 N. Y. Sup. Ct. 183.

payable, even if the one assigned was presently due.¹ If the defendants' demand had become mature at the time of the assignment, it could undoubtedly have been set off under the equitable rule before stated, on account of the insolvency of W. & L. A firm made a general assignment, having at the time a claim due and payable against the defendants. The assignee brings an action upon the demand, and the defendants set up a note of the assignors which they held at the time of the assignment, but which did not fall due until after that date. The attempted set-off was rejected. "An allowance to a party by way of set-off is always founded on an *existing* demand *in presenti*, and not on one that may be claimed *in futuro*."² In an action by an assignee for the benefit of creditors, the defendant relied upon a judgment for costs recovered by himself against the assignor after the making of the transfer. This set-off was not admitted, and it was decided that no notice of the assignment was necessary to cut off such a defence.³ And when the defendants, in an action brought upon an assigned demand, alleged payments which they had made, subsequent to the assignment, as sureties for the assignor upon a liability existing prior to and at the time thereof, this set-off was overruled on the same principle; for, although

¹ *Myers v. Davis*, 22 N. Y. 489, 490, per Denio J. After stating that the code has not made any change in the substantial rights of the parties, he proceeds: "An assignee of a *chose in action*, who has given notice of the assignment, is not liable to be prejudiced by any new dealings between the original parties to the contract; but he takes the contract assigned, subject to all the rights which the debtor had acquired prior to the assignment, or to the time notice was given of it, when there is an interval between the execution of the transfer and the notice. . . . If the defendants had completed [the manufacture] before the assignment, the right to an assignment would have attached, of which the defendants would not have been deprived by any act of W. & L.; but, unfortunately for the defendants, no debt had arisen in their favor when W. & L. failed and made their assignment; and when a debt afterwards came into existence by the completion of the work, the demand against the defendants had become the property of the plaintiff

as trustee for the creditors of the insolvent debtors. The rule of law applicable to the case is stated in 2 R. S. (of N. Y.) p. 354, § 18 (8)." . . . "The rule is that, when such claims exist in a perfect condition at the same time, either party may insist upon a set-off. So, when one claiming a set-off has a demand against the other, presently payable, and the other party is insolvent, the former may claim to have the set-off made, though the demand of his adversary against him has not become payable. But if, before the demand of the party claiming the set-off becomes mature, the opposite claim has been assigned, whether the assignment carries the legal or only the equitable title, the right of set-off no longer exists. This is the present case; and the set-off cannot, in my opinion, be claimed;" citing *Chance v. Isaacs*, 5 Paige, 592; *Bradley v. Angell*, 8 N. Y. 475, 498.

² *Martin v. Kunzmueller*, 87 N. Y. 396; *Watt v. The Mayor, &c.*, 1 Sandf. 28; *Wells v. Stewart*, 3 Barb. 40.

³ *Ogden v. Prentice*, 83 Barb. 160.

there was a liability which *might* result in a debt, there was no existing debt until the payment had actually been made.¹ In another action by an assignee the defendant insisted that a similar set-off arising from his payment as surety for the assignor, made under the same circumstances as the last, should be allowed as within the equitable rule on account of the assignor's insolvency. The set-off was rejected, however, because there was no existing indebtedness in favor of the defendant against the assignor at the date of the assignment. Such a present indebtedness is indispensable, whether the case is to be governed by the ordinary rule, or whether the equitable doctrine based upon the assignor's insolvency is relied upon.² When a negotiable promissory note is assigned before it becomes due, the maker thereof cannot offset against the assignee a claim existing against the original payee and assignor of the note, although the assignee have notice of such claim at and before the time of the transfer to him; there is no case for the set-off between the original parties at the date of the assignment, because the demands are not then matured, and the notice given to the assignee is not of any existing legal defence.³ There being no possibility of setting off a claim of damages arising from a tort or fraud against a demand growing out of contract, if two such opposing claims exist and are in suit, and the creditor in the contract assigns his cause of action, which is afterwards merged in a judgment in favor of the assignee, and subsequently to that assignment the opposing party—the debtor in the contract—obtains a judgment for the damages in his action on the tort, the latter is not entitled to set off this judg-

¹ *Adams v. Rodarmel*, 19 Ind. 389.

² *Walker v. McKay*, 2 Metc. (Ky.) 294, per Simpson C. J. "The doctrine that a debt or demand cannot be used as a set-off until it becomes due, and that, unless it be due before notice of the assignment, it is not available against the assignee, is fully established by adjudged cases. . . . The appellant, not having paid the debt for which he was surety at the time he was notified of the assignment of his own note, had at that time no available set-off or defence against it. The mere fact that he was surety for the assignor on another note, and that he was insolvent, would not constitute an equitable defence to an action on his note either in the name of the assignor or the as-

signee." See, however, *Morrow's Assignees v. Bright*, 20 Mo. 298, in which, upon the same facts, the set-off was allowed, the court plainly mistaking or misconceiving the extent and limitations of the equitable doctrine flowing from the insolvency of the assignors.

³ *Williams v. Brown*, 2 Keyes, 486. See also *Barlow v. Myers*, 6 N. Y. Sup. Ct. 188. But where negotiable paper is assigned after maturity, the maker's rights of set-off are the same as though the demand assigned was not negotiable. *Norton v. Foster*, 12 Kans. 44, 47, 48; *Leavenson v. Lafontaine*, 8 Kans. 528; *Harris v. Burwell*, 65 N. C. 584; *contra*, *Richards v. Daryl*, 84 Iowa, 427, 429.

ment against the one recovered against himself by the assignee. No rights of set-off existed at the date of the transfer, and none could spring up after that time.¹

§ 165. It is possible that a right of set-off may be available at the time an action is brought, although at some prior period it was suspended, as is well illustrated by the following case: On the 29th of August the Hollister Bank discounted for one Monteath a sight draft on New York drawn by him, and passed the proceeds to his credit as a deposit. He did not draw them out. This draft was dishonored on presentment. On the 31st the bank failed, and in the course of time Robinson was appointed its receiver. On the 21st of September Monteath assigned to the Howes his claim against the bank for the sum on deposit, the same being partly or wholly the proceeds of the said draft. At the time of the assignment the draft in question was held by parties in New York, to whom the bank had transferred it as collateral security; and, of course, during the interval in which the draft was thus held, the bank could have had no possible set-off by means of it against the demand of Monteath for his deposit, either made by him or by his assignee. But before any action was brought, the bank again became owner of the draft. An action was afterwards commenced by the receiver to recover an indebtedness due to the bank from the Howes; they set up the claim of Monteath for his deposit assigned to them, as above stated; and the receiver in fact opposed the demand of the bank against Monteath upon the dishonored draft as a set-off to the defendants' set-off. Although the New York Court of Appeals held that the debt against the bank assigned to the defendants by Monteath should be disallowed, yet their entire reasoning shows that it was disallowed, not because it would not in itself have been a valid set-off, but because its effect was entirely destroyed by the counter set-off of the draft in the hands of the bank. If the bank had retained the continuous ownership of the draft, as soon as it was dishonored it would have been a good claim against Monteath, and would have extinguished, in whole or in part, his claim for the money due on deposit; this set-off,

¹ *Roberts v. Carter*, 38 N. Y. 107. set-off would not have arisen, since at the time of the transfer no debt existed which could be set off. See *Martin v. Richardson*, 68 N. C. 255, and cases cited.

existing at the date of the assignment to the defendants, would have been equally available against them; and as the bank became owner of the draft before the action was brought, its original right revived with the same force and to the same extent as though the draft had never been out of its control.¹

§ 166. It is held, in California, that a demand against an assignor, which was obtained by the debtor or accrued in his favor before notice of the assignment, although in fact subsequent to the assignment itself, may be set off against the cause of action in the hands of the assignee.² This ruling, however, is clearly opposed to the doctrine of the New York cases already quoted, and to the theory of set-off generally adopted. Notice may be required in order to cut off other defences; but a set-off, according to the accepted rule, must exist in the form of a debt then due and payable to the debtor at the date of the transfer. A note, payable on demand, with or without interest, transferred at a considerable interval of time after its date, is taken and held by the assignee, subject to all defences existing in favor of the maker against the payee at the time of the transfer; in other words, such a note is transferred after maturity.³

§ 167. When notice to the debtor is necessary to a complete protection of the assignee against subsequent transactions between the assignor and the debtor, such as payment, release, and the like, an actual notice is not indispensable. Such information or knowledge as would be sufficient to put any reasonable man upon the inquiry, when an inquiry reasonably followed up would have led to an ascertaining of the truth, is equally effective to protect the assignee; in short, the equitable rule in reference to purchasers of land applies to the assignees of things in action.⁴ In Ohio, a set-off against the person beneficially interested, for whose benefit the suit is prosecuted, may be interposed when the action is brought by one who is, within the meaning of the code, a trustee of an express trust, and there has been no assignment at all. Thus, where a promise is made to A. for the benefit of

¹ Robinson v. Howes, 20 N. Y. 84.

² McCabe v. Grey, 20 Cal. 509.

³ Herrick v. Woolverton, 41 N. Y. 581, reversing s. c. 42 Barb. 50. This case decides nothing new in the law of set-off; it simply ends a long controversy in the New York courts upon the ques-

tion whether notes on demand *with interest* are continuing securities, or whether, like such notes without interest, they become due at once.

⁴ Wilkins v. Batterman, 4 Barb. 47; Williamson v. Brown, 15 N. Y. 354.

B., and the former, in pursuance of the express permission of the code, brings the action in his own name, a set-off existing against B., who is the real party in interest, the beneficiary for whose behalf the contract was made and the suit is maintained, may be pleaded, and, if proved, will be allowed in total or partial bar of the recovery.¹ While in actions prosecuted by assignees the defendant can always avail himself of any existing valid set-off, and sometimes counter-claim, *as a defence*, he cannot recover a judgment against the assignee for the excess of any of his claim over the amount of debt established by the plaintiff; as against the assignee, a set-off and a counter-claim of the same nature — that is, a right of action which would be a counter-claim if prosecuted against the original assignor — can only be used defensively, and can do no more than defeat the action entirely.²

§ 168. Many difficulties have arisen, and many cases have been decided, growing out of proceedings to wind up insolvent corporations, and especially insolvent insurance companies; but, as the questions generally turned upon particular provisions of charters, or of statutes regulating such proceedings, little or no aid can be obtained from these decisions in construing the section of the code under consideration. A portion of these companies were mutual, in which every person assured became at once a corporator, so that in any business transaction between himself and the company he would necessarily occupy both the position of creditor and of debtor. This double relation is destructive to any power on his part of invoking the doctrine of set-off. Other companies were stock corporations, and, in addition to the rules as to set-off common to all creditors and debtors, there are special statutory provisions in many States regulating the winding up of these bodies, which greatly enlarge the scope of set-off. The adjudications made in the settlement of such corporations, and the particular rules applicable to them adopted by the courts, have, therefore, little or no connection with the subject-matter of the present discussion. In the case of a mutual company there is no room for any set-off, as has been expressly determined. A marine insurance company having become insolvent, and a receiver of its affairs appointed, he brought an action on

¹ *Miller & Co. v. Florer*, 16 Ohio St. 525; *Loomis v. Eagle Bank*, 10 Ohio St. 148, 151. 827; *Casad v. Hughes*, 27 Ind. 141.

² *Leavenson v. Lafontaine*, 8 Kans. 523,

certain notes given by the maker thereof for the premium of several policies of insurance. A loss had occurred on one of these policies which became due and payable before any of the notes fell due, and before the appointment of the receiver and the assignment to him. There was an interval of time, then, both before the appointment of the receiver and afterwards, during which the company first and the receiver subsequently were holders of a claim against the defendant not yet matured, while the defendant was holder of a claim against the company which *was* due and payable. Upon the general doctrine as heretofore stated in the text, the maker of these premium notes could not have had an available set-off against the assignee, because at the date of the transfer both demands had not matured; but, as his own claim was then due and payable, the equitable rule founded upon the insolvency of the assignor would have relieved him. The set-off was entirely rejected, however, on the ground that the company was mutual, the defendant being a corporator, and both a debtor and a creditor.¹ In other cases brought by the receiver of an insolvent insurance company, not mutual, upon premium notes, claims by the makers of the notes on account of losses which occurred previous to the appointment of the receiver, but not adjusted so as to become actually payable until after the transfer to him, have been allowed as offsets, not, however, by virtue of the general law as to offsets, — it being held that they did not fall within the settled rules, — but by virtue of certain provisions contained in the statute relating to insolvent corporations which describe such claims as “mutual credits,” and direct them to be set off.²

§ 169. When an executor or administrator sues individually on a note given, or a promise made to him as such personal representative for a debt owing to the deceased at the time of his death, it is the rule in New York that the defendant cannot set off claims due to himself from such decedent, although accruing prior to the death, “on the ground that the plaintiff’s demand [that actually sued upon] arose after the death of the testator; and in such

¹ *Lawrence v. Nelson*, 21 N. Y. 158. It was conceded, by way of a dictum, that if the corporation had not been mutual, the set-off would have been allowed as stated in the text.

² *Osgood v. De Groot*, 86 N. Y. 848. See, however, *Osgood v. Ogden*, 4 Keyes, 70.

a case, no set-off can be received, notwithstanding it existed at the time of the death of the deceased." ¹

§ 170. The foregoing cases and statements relate to the special defence of set-off as against the assignee. Exactly the same rules apply to every other species of defence, with the single modification, that, in respect of many such defences, the point of time which limits the effect or cuts off the availability of the defence is not the date of the assignment, but the date of the notice thereof, actual or implied, which is given to the debtor. If the debtor is not notified actually or impliedly of the assignment, it is possible that many transactions between himself and the assignor, done in good faith on his part, may have the same effect in discharging his indebtedness as if the demand had not been assigned,—such as payment to or release by the original creditor, the assignor. But no transaction can have this effect if entered into subsequently to a notice of the assignment given to the debtor, or to such information received by him as in law amounts to the same thing as actual notice. Thus, if after a notice to the debtor that the demand against him is assigned, he make a payment to the assignor, he cannot rely upon it as a defence partial or total to an action brought by the assignee to enforce the claim.²

The scope of this work does not require nor even permit that I should discuss the defence of set-off, or any other particular defence, in an exhaustive manner. The sole purpose of this section is to construe and interpret the provision, found in almost the same language in all the State codes of procedure, and to ascertain what change, if any, that provision had wrought in the pre-existing rules of the law in relation primarily to parties, and incidentally to the availability of defences where the party plaintiff is an assignee of a thing in action.

¹ *Merritt v. Seaman*, 6 N. Y. 168, citing *Root v. Taylor*, 20 John. 187; *Fry v. Evans*, 8 Wend. 580; *Mercein v. Smith*, 2 Hill, 210; 2 R. S. 279.

² *Field v. The Mayor, &c. of N. Y.*, 6 N. Y. 179.

SECTION FIFTH.

WHEN A TRUSTEE OF AN EXPRESS TRUST MAY SUE.

§ 171. There are two forms of the statutory provision, which differ, however, very slightly. The first is: "An executor, an administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."¹ The second form is a little more special: "An executor, administrator, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."² The only difficulties of interpretation presented by this section are the determining with exactness what persons are embraced within the three classes, described as "trustees of an express trust," "persons with whom or in whose name a contract is made for the benefit of another," and "persons expressly authorized by statute to sue." It is plain that there are substantially three classes. The second and better form of the provision actually separates them, and does not represent one as a subdivision of the other. The first form in terms speaks of "the person with whom or in whose name a contract is made for the benefit of another" as an instance or individual of the wider and more inclusive group, "trustees of an express trust." It should be carefully noticed, however, that these two expressions are not stated to be synonymous; the former is not given as a definition of the latter. The section does not read, "a trustee of an express trust shall be construed to mean a person with whom or in whose name a contract is

¹ N. Y. § 113; Ind. § 4; Minn. § 28; Utah, § 66; North Carolina, § 57; Wash. Cal § 369; Mo. art. 1, § 8; Wisc. ch. 122, § 4; Ida. § 6; Wyo. § 84; Mont. § 6. § 14; Florida, § 64; South Carolina, § 27; Ohio, § 27; Kansas, § 28; Iowa, § 136; Oregon, § 29; Nevada, § 6; Da. § 2544; Nebraska, § 30; Kentucky, § 33.

made for the benefit of another ;” but simply that the latter shall be regarded as one species of the genus. There is here no limitation, but rather an extension, of the meaning, and the clause of course recognizes other kinds of trustees besides the party to the special form of contract, who is not very happily termed a “trustee.” The section of the New York code, when originally passed, contained but the first sentence as it now stands. Some doubt arose as to its meaning, and a judicial decision having held that the phrase embraced, among others, a person with whom or in whose name a contract is made for the benefit of another, the legislature, to remove all possibility of doubt, added this judicial language as an explanatory clause. The two forms of the provision, although their phraseology differs somewhat, mean exactly the same thing, and establish exactly the same rule. As these two phrases, whether they be regarded as separate, or one as partially explanatory of the other, are the most comprehensive ones in the section, and present the main difficulties of construction, I shall discuss them first in order, and shall endeavor to ascertain what particular classes of persons were intended to be described by them. This discussion will consist in discovering, if possible, some general principle of interpretation by which to test each particular case, and in stating the instances which have been definitely passed upon by the courts.

§ 172. What is a “trustee of an express trust”? The section uses the term in its most general sense without limitation, so that when its full legal signification is ascertained, *that* must be its meaning in this connection. If the legislature has said, as in New York and other States, that, in addition to its generally accepted technical import, it shall also include certain persons who are not usually, nor perhaps with strict accuracy, denominated “trustees,” this exercise of the legislative power within the domain of definition does not change, certainly does not lessen, its signification, as it stands without the explanatory comment. In Ohio, and in several of the States, the phrase is used alone, but accompanied by the clause which is descriptive of another class, and is not a mere partial explanation. We must find the true legal definition of “trustees of an express trust,” and add to this the “persons with whom or in whose name contracts are made for the benefit of others ;” the combined result

will be the entire class intended by the legislature. It is obvious that the trust must be "express," in contradistinction to implied. In the large number of instances where a trust is raised by implication of law from the acts, circumstances, or relations of the parties, the trustee is certainly not embraced within the language of the provision. An *express* trust assumes an intention of the parties to create that relation or position, and a direct act of the parties by which it is created in accordance with such intention, outside of the mere operation of the law. In the case of an implied trust, the law, for the purpose of doing justice, and usually for the purpose of working out some equitable remedy, lays hold of the prior situation, acts, or circumstances of the parties, declares that a trust arises therefrom, and imposes the quality of trustee upon one, and of beneficiary upon another, in a manner and with a result that are often the furthest possible from their actual design. In an express trust the parties intend such a relation between themselves, carry out their intention by suitable words, and the law confirms and accomplishes the object which they had in view. An express trust primarily assumes three parties: the one who by proper language creates, grants, confers, or declares the trust; the second who is the recipient of the authority thus conferred; and the third for whose benefit the authority is received and held. It is true that in many instances the first-named parties are actually but one person; that is, the same individual declares, confers, receives, and holds the authority for the benefit of another; but the theory of the transaction is preserved unaltered, for the single person who creates and holds the authority acts in a double capacity, and thus takes the place of two persons. It is impossible, however, to conceive of an express trust as a legal transaction or condition, without assuming the prior intention, and the express language by which this intention is effected, and the trust created resting upon one as the trustee for the benefit of a second as the beneficiary; and, except as every grant, transfer, or delegation of authority and power is in a certain broad sense a contract, the notion of a contract is not essential to our conception of an express trust. The authority may be conferred by the public acting through governmental machinery, as in the case of officers; or by the intervention of courts, as in the cases of administrators, executors, receivers, and the like; or by private persons, as in innumerable

instances of trusts relating to real or personal property; but there must be the intent to accomplish that very result, and this intent must be expressed by language, or by some process of delegation which the law regards as an equivalent. Furthermore, in its accurate legal signification, a trust implies something which is the subject thereof. Although the word may have a more extensive meaning in its popular use, so that a trust may be spoken of where the trustee is simply clothed with a power to do some personal act unconnected with any property in which he has an interest or over which he has a control, yet this is not its legal import. An illustration of this legal notion of a trustee may be seen in the case of a guardian over the person alone of his ward, without any interest in or power over his estate, or the committee of the person of a lunatic. Such a guardian or committee, although possessing a power to be exercised for the benefit of another, is not a trustee; and the term, when applied to him, could be used only in a popular and not a legal sense. Such a guardian or committee would not therefore, by virtue merely of the permission granted in the provision of the statute under examination, be entitled to sue in his own name as a trustee of an express trust. In the light of this analysis of the expression as a term of legal import, it is plain that "a person with whom or in whose name a contract is made for the benefit of another," is not necessarily a trustee. He may be; and whether he is or is not, must depend entirely upon the nature and subject-matter of the contract itself. The contract may be of such a kind, stipulating concerning property in such a manner, that the contracting party will be made a trustee. On the other hand, it may be of such a kind, having no reference perhaps to property, or stipulating for personal acts alone, that the contracting party will not be a trustee in any proper sense of the word, but will be at most an agent of the person beneficially interested. There are numerous instances, therefore, in which an agent, who enters into an agreement for either a known or for an unknown principal, is permitted, in accordance with the particular clause under consideration, to sue in his own name.

§ 173. I shall proceed to show, in the first place, how far the foregoing description is sustained by judicial authority. Few cases have attempted to define the phrase, "trustee of an express trust," in any comprehensive manner, for the courts have in most

cases been content with determining whether the particular instance before them fell within the term. The following definitions or descriptions, however, have been given: "An express trust is simply a trust created by the direct and positive acts of the parties, by some writing, or deed, or will. And it is to be observed, in reference to § 4 of the code [of Indiana], that it does not assume to define the meaning of the term 'trustee of an express trust' in its general sense; it simply declares that these words, within the meaning of the section, 'shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.' Evidently this provision was not intended to limit the meaning of the general term, 'express trust,' or to confine the operation of the statute to the particular class of cases referred to, but rather to enlarge its sense by including also that class within it."¹ In another case it was said: "In order to constitute a trustee of an express trust, as I understand the statute, there must be some express agreement to that effect, or something which in law is equivalent to such an agreement. The case of factors and mercantile agents may or may not constitute an exception under the custom and usage of merchants. But in every other case the trust must, I think, be expressed by some agreement of the parties, not necessarily, perhaps, in writing, but either written or verbal, according to the nature of the transaction. In this case no agreement is shown that the plaintiff was to take or hold as trustee, and that he is a trustee results merely from other circumstances. It is implied from the fact of partnership, and from the fact that the plaintiff received the assignment on account of a debt due the firm. If it is not a case purely of implied trust, as distinguished from an express trust, then I am at loss to conceive of one; and to hold the plaintiff to be a trustee of an express trust would, in my judgment, be a palpable disregard of the statute, and a violation of the intent of the legislature."² In a case where a contract in the nature of a

¹ *Weaver v. Trustees of the Wabash, &c., Canal Co.*, 28 Ind. 112, 119.

² *Robbins v. Deverill*, 20 Wisc. 142, per Dixon C. J. This was an action by the plaintiff as assignee of P. & W. The assignment was in writing, but was taken on account of a debt due from P. & W. to the firm of R. & L., which consisted of the plaintiff and the two

others, with an understanding that P. & W. were not to be credited on their debt to R. & L. until the money was collected. Dixon C. J. said: "The demand was transferred to the plaintiff alone by words of absolute assignment, no trust being expressed. . . . Upon these facts the plaintiff cannot recover. He is not the real party in interest, nor the trustee of

lease was effected by a person describing himself in the instrument as agent of the owners, but who had no interest whatever in the premises leased, and did not execute the instrument, and to whom no promise was made as the lessor, it was held that he could not maintain an action for the rent or for possession of the land forfeited by non-payment of the rent. He could not sue as the "person with whom, or in whose name, a contract is made for the benefit of another," because no promise at all was made to him, and he was not a "trustee of an express trust." The court said: "One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue upon such contract in his own name." Of course this last expression must be taken in connection with the facts of the case; namely, that no promise was made to the plaintiff individually.¹

§ 174. The nature of an express trust, and the classes of persons embraced within the statutory phrases in question, were determined, upon great consideration by the New York Court of Appeals, in the leading case of *Considerant v. Brisbane*.² "The term 'trustee of an express trust' had acquired a technical and statutory meaning. Express trusts, at least after the time of the adoption of the [New York] Revised Statutes, were defined to be trusts created by the direct and positive acts of the parties, by some writing, or deed, or will; and the Revised Statutes had abolished all express trusts except those therein enumerated

an express trust, within the meaning of the statute. He is not a trustee of an express trust, because no such trust appears from the assignment, and none is shown to exist between himself and his copartners by virtue of any other instrument." He then adds the remark quoted in the text.

¹ *Rawlings v. Fuller*, 81 Ind. 255. Fuller sued on the following agreement: "Articles of agreement between B. F. Fuller and M. Rawlings: I, B. F. Fuller, agent for Sarah Floyd's heirs' property, do agree to rent [certain premises] to M. Rawlings for [a certain rent], and on the failure on the part of the said M. Rawlings to pay said rent on the first day of every month in advance, then it is hereby agreed between B. F. Fuller, landlord,

and M. Rawlings, tenant, that the above contract is at an end, and B. F. Fuller shall be entitled to take possession of said property." The complaint alleged rent unpaid, and demanded possession and the amount of rent due. The court said: "It will be observed that the complaint does not assert any claim of title in Fuller. The contract is not signed by Fuller, and does not, in express terms, contain a promise to pay rent to him. It describes him as agent of the property, and expressly states that it belongs to the heirs of S. Floyd. We do not think the facts constitute Fuller a trustee of an express trust," adding the language quoted in the text.

² *Considerant v. Brisbane*, 22 N. Y. 889, 895, per Wright J.

which related to land. If this section (§ 113) of the code was to be restricted and limited to those enumerated express trusts, the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section (§ 113) was intended to obviate, would continue to exist in a large class of formal and informal trusts. Accordingly, in 1851, the section was amended by adding the provision that 'a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.' It is to be observed that there is no attempt to define the meaning of the term 'trustee of an express trust' in its general sense; but the statutory declaration is that these words 'shall be construed to include a person,' &c. The counsel for the respondent insists that the sole intention of the legislature in amending the section was to remove a doubt that had been expressed whether a factor or other agent, who had at common law a right of action on a contract made for the benefit of his principal by reason of his legal interest in the contract, was by the code deprived of that right. But no such limited intention can be inferred from the words of the statute. Indeed, it is only by a liberal construction of the section that the case of a contract by a factor (an individual contract) can be brought within it at all. It is intended manifestly to embrace, not only formal trusts declared by deed *inter partes*, but all cases in which a person acting in behalf of a third party enters into a written express contract with another, either in his individual name, without description, or in his own name expressly, in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another." These definitions and descriptions of the term fully sustain the conclusions reached in the preceding paragraph as to the legal meaning of the phrase "trustee of an express trust." It is abundantly settled that an agent cannot sue in his own name to enforce an implied liability to his principal; if by any possibility he should be a trustee under such circumstances, he would not be the trustee of an *express* trust.¹

¹ *Palmer v. Fort Plain, &c. Plank R. Co.*, no covenant or agreement running to these officers in terms. They, as agents of the 11 N. Y. 376, 390, per Selden J. "There is

§ 175. Having thus attempted to arrive at a general definition of the term, I shall proceed to consider the cases which are embraced within it, and shall take at first those in which a "person with whom, or in whose name, a contract is made for the benefit of another" has sued in his own name. It is fully established by numerous decisions that when a contract is entered into expressly with an agent in his own name, the promise being made directly to him, although it is known that he is acting for a principal, and even although the principal and his beneficial interest in the agreement are fully disclosed and stipulated for in the very instrument itself, the agent in such case is described by the language of the statute, and may maintain an action upon the contract in his own name without joining the person thus beneficially interested.¹ The following are particular instances, or examples

town, convey the right to use the highway upon a certain condition. It is virtually the act of the town through them. If an implied covenant arises upon the instrument, it is a covenant with the town, and must be enforced by, and in the name of, the town." *Ruckman v. Pitcher*, 20 N. Y. 9. "The agent may, in many cases, sue upon express contracts made with himself by name. . . . But this implied duty or *assumpsit* arises only in favor of those to whom the money in fact belonged, and, therefore, cannot be enforced in the name of another person to whom the obligation is not due."

¹ *Considerant v. Brisbane*, 22 N. Y. 389, reversing s. c. 2 Bosw. 471. The plaintiff was agent for a foreign corporation which did business under the name of "Bureau, Guillon, Goden, & Co." The defendant applied to the plaintiff for stock in said corporation, and authorized the plaintiff to subscribe in his name for such stock to the amount of \$10,000, and, in payment of the subscription, gave plaintiff two notes, each in the following form: "New York, March 1, 1855. On the first day of July, 1855, I promise to pay V. Considerant, executive agent of the company Bureau, Guillon, Goden & Co. the sum of \$5,000, for which I am to receive stock of said company known as premium stock, to the amount of \$5,000, value received. A. Brisbane." The plaintiff alleged that he had entered de-

fendant's name as a subscriber; averred a tender of the stock and a refusal to accept the same; and sued in his own name on the notes. The Court of Appeals held that he could maintain the action. The judgment of Wright J. is an exhaustive discussion of the whole subject. Denio J. dissented, but not from the general reasoning as to the true interpretation of the code. His dissent was based entirely upon a construction of the notes sued upon. He insisted that the promise in these notes was, in fact, made to the company, and not to the agent; and so the case did not fall within the terms of the statutory provision. *Rowland v. Plalen*, 1 Bosw. 48. Plaintiff sued on a contract in which he was described as "acting on behalf of I. S. and others," and stipulations were made by and with him. *Cheltenham Fire-brick Co. v. Cook*, 44 Mo. 29. The defendants executed a bond, wherein they bound themselves "to pay the said Cheltenham Fire-brick Co. for their own use and for the use of Evans and Howard, respectively," certain moneys under certain conditions. The company sued, alleging moneys due to it and also to Evans and Howard. *Wright v. Tinsley*, 30 Mo. 389. An agreement was entered into between Wright, the plaintiff, for the benefit of Mrs. Dawson, his daughter, and Tinsley, the defendant. "Wright obviously comes literally within this definition, and is the proper party plain-

of particular classes of cases, in which an agent has been permitted to sue, or may always sue, in his own name, because the contract is made with him directly, although on behalf of a known principal: on a sealed lease between the plaintiff, as agent for the owner, of the first part, and the defendant as the lessee;¹ on a sealed contract between plaintiff and defendant, the plaintiff describing himself as agent for his sisters, and stipulating that they should act in defendant's theatre at specified wages, which the latter covenanted to pay, the action being brought for such wages;² where the plaintiff, being the holder of the legal title to certain land, which he held, however, merely for the benefit of a married woman, was induced, by false representations, to execute a mortgage thereon, supposing it to be for her benefit and at her request, but in fact without any consideration paid to himself or to her, brought an action in his own name to restrain a foreclosure of the mortgage;³ in an action on a policy of marine insurance "for the account of whom it may concern," and in case of loss the amount insured to be paid to the plaintiff or order;⁴ where a promise was made to the administrator of an estate, and he afterwards resigned, and another was appointed in his place, it being held that he was the proper party

tiff." *Weaver v. Trustees of the Wabash, &c. Canal Co.*, 23 Ind. 112; *Rice v. Savery*, 22 Iowa, 470, in which it was held that either the agent or the beneficiary might sue. See *supra*, § 140. *Winters v. Rush*, 34 Cal. 136. Action by Winters on the following note: "Twelve months after date I promise to pay W. M. Winters, or any authorized agent of the Pacific Methodist College, the sum of \$1,150, for the endowment of said college." The court held the action to be properly brought in the name of the plaintiff, and approved of *Considerant v. Brisbane*. *Ord v. McKee*, 5 Cal. 515. Notes were given by defendant to "James L. Ord, agent of W. H. McKee, for the price of land owned by McKee, and sold to the defendant; and a mortgage to secure the notes was given back directly to McKee. The action is by Ord to foreclose the mortgage. Held, that Ord could sue on the notes; and, as the mortgage is a mere security for the payment of the notes and an incident of the debt, he could maintain

the action to foreclose. *Scantlin v. Allison*, 12 Kans. 85, 88. A note was, by consent of all the persons interested, given to one who held it in trust for others. An action by this payee alone, without joining the beneficiaries, was sustained. And where A. was jointly interested with others in a claim, and made a contract in his own name with B., by which the latter agreed to collect the same, and account to him for the proceeds, he was permitted to maintain an action against B. without joining the others as coplaintiffs. *Noe v. Christie*, 51 N. Y. 270, 274. In *Hubbell v. Medbury*, 53 N. Y. 98, the provision of the code was held to be permissive only, and not to prohibit an action by the beneficiary, even without the trustee.

¹ *Morgan v. Reid*, 7 Abb. Pr. 215.

² *Nelson v. Nixon*, 18 Abb. Pr. 104.

³ *Brown v. Cherry*, 38 How. Pr. 352.

⁴ *Walsh v. Wash. Mar. Ins. Co.*, 8 Robt. 202; *Greenfield v. Mass. Mut. Ins. Co.*, 47 N. Y. 430.

to sue ;¹ where a grantee in a deed of land was simply acting as agent for another, and the purchase price was paid with that other's money, the grantee is the proper party to sue for the breach of a covenant which was broken immediately upon the execution of the deed, *e. g.*, a covenant against incumbrances ;² a guest at an inn who had property of another in his possession, which was lost, was held to be the proper party to sue for its value ;³ an auctioneer may sue for the price of goods sold by him, whether he have any interest in the price or not,⁴ and a sheriff, for the price of property sold by him on execution ;⁵ the master of a ship or other vessel may maintain an action for freight, or on any contract concerning the ship, entered into on behalf of the owners,⁶ or for the taking and carrying away, conversion of, or injury to, the cargo.⁷

§ 176. Various kinds of bonds and undertakings generally required by statute, and given to some designated obligee, although showing on the face that they are designed to protect, secure, or indemnify other persons, are also contracts made " with, or in the name of, one person for the benefit of another ;" and although the party immediately interested may in general sue in his own name,⁸ yet the obligee or person to whom the promise is made may always, unless forbidden by statute, maintain the action, and in some States is the only one who is permitted to do so. Among these are bonds in great variety given to the " people " or to the " State," conditioned upon the faithful discharge of their duties by public, local, or municipal officers, actions on which, except when otherwise directed by statute, may be brought by the people or the State ;⁹ bonds running to the people or to the State, conditioned upon the faithful discharge of duties by various private or semi-private trustees, or by persons appointed in judicial proceedings and the like, such as those given by administrators, executors, or receivers ;¹⁰ those given by the trustees of

¹ *Harney v. Dutcher*, 15 Mo. 89.

² *Hall v. Plaine*, 14 Ohio St. 417, 428.

³ *Kellogg v. Sweeney*, 1 Lans 397.

⁴ *Minturn v. Main*, 7 N. Y. 220, 224 ;
Bogart v. O'Regan, 1 E. D. Smith, 590.

⁵ *Armstrong v. Vroman*, 11 Minn. 220 ;

McKee v. Lineberger, 69 N. C. 217, 239.

⁶ *Kennedy v. Eilau*, 17 Abb. Pr. 78.

⁷ *Houghton v. Lynch*, 13 Minn. 85.

⁸ See *supra*, §§ 139, 141.

⁹ *Hunter v. Commissioners of, &c.*, 10 Ohio St. 515 (county treasurer's bond running to the State) ; *State v. Moore*, 19 Mo. 369 (sheriff's bond) ; *Meier v. Lester*, 21 Mo. 112 (constable's bond) ; *Shelby Co. v. Simmonds*, 33 Iowa, 345 (county treasurer's bond running to the county).

¹⁰ *People v. Laws*, 8 Abb. Pr. 450 ;
Annett v. Kerr, 28 How. Pr. 324 ; *People*

an estate, although entirely for the benefit of the persons having an interest in the estate;¹ bastardy bonds² and the like; bonds given directly to a sheriff or other superior officer to indemnify a deputy sheriff or other subordinate officer against the consequences of acts done in the discharge of the latter's official duties;³ a bond given by a town superintendent of common schools to the supervisor of the town, an action on which must be brought by the supervisor or his successor in office.⁴

§ 177. In all the instances heretofore mentioned, the contract has been made with an agent in his own name, and the promise given to him, although the principal or beneficiary was known, and even expressly designated and provided for by the terms of the agreement. The rule is the same, and even more emphatically so, if the principal or beneficiary is, at the time of the contract, unknown or undisclosed, or not mentioned in the instrument. When a contract, even in writing, is made with and by an agent, and no mention is made of any principal or beneficiary, but the other contracting party supposes he is dealing with the former on his own private account, but in fact such person is an agent for an undisclosed principal and enters into the agreement in the course of his agency, actually effecting the contract on behalf of that superior behind him, the rule is well settled that the one who was thus a direct party to the agreement—the actual agent—may bring an action upon it in his own name, or the principal may sue in *his* name.⁵

§ 178. I have thus far considered only the particular class of trustees of an express trust specially described in some of the codes as “persons with whom or in whose name a contract is made for the benefit of others.” There are numerous other and more properly designated classes of such trustees; and whatever be their nature, or the object of the trust, they may, by virtue of

v. Townsend, 37 Barb. 520. The reporter's head-note reads *should* be sued by the people: this is more than was decided. Baggott v. Boulger, 2 Duer, 160. The bond may also be prosecuted by the person interested and benefited.

¹ People v. Norton, 9 N. Y. 176, 179.

² People v. Clark, 21 Barb. 214.

³ Stilwell v. Hurlbert, 18 N. Y. 374, 375.

⁴ Fuller v. Fullerton, 14 Barb. 59.

⁵ Erickson v. Compton, 6 How. Pr. 471; Grinnell v. Schmidt, 2 Sandf. 706; Union India Rubber Co. v. Tomlinson, 1 E. D. Smith, 864; Van Lien v. Byrnes, 1 Hilt. 133; Higgins v. Senior, 8 M. & W. 884; Sims v. Bond, 5 B. & Ad. 389, 393, per Lord Denman. In ordinary contracts made by agents for their principals, the latter are the real parties in interest, and must sue. Swift v. Swift, 46 Cal. 266, 269.

this section of the statute, maintain an action in their own names. They are generally created or appointed by some instrument in the nature of a grant or conveyance, or they may be appointed in judicial proceedings by a court. Although the rule is simple and peremptory that these trustees may sue without joining the beneficiaries, the following instances in which the rule has been applied may be enumerated: assignees, general or special, in trust, to pay creditors;¹ the assignees of a contract in trust to reimburse out of the proceeds thereof third persons for advances made;² trustees appointed to take and collect subscriptions for colleges and other similar purposes;³ a receiver appointed in another State;⁴ the grantee of lands in trust for the use and benefit of another is the proper party to sue for possession or for damages by trespass or other injury;⁵ a person who agreed to hold notes and a mortgage for the benefit of another, and to apply the proceeds thereof when collected in payment of a debt owed by himself to that other, may sue to enforce the securities;⁶ the assignee of a stock subscription, who holds it for the benefit of a bank, is the proper party to bring an action upon it;⁷ a person to whom chattels had been transferred for the benefit of a married woman in trust, to permit her to have exclusive use and possession, and to dispose of them by her direction, is the proper party to bring an action to restrain interference with or disturbance of her possession.⁸ It has been held in Kentucky that where a railroad company issued bonds which were held by many different persons, and executed a mortgage to a trustee for the purpose of securing such bonds, this trustee, who was the sole mortgagee named in the instrument, could not maintain an action in his own name alone to foreclose the mortgage on account of the non-payment of the money due on the bonds, but he must join the bond-holders as parties plaintiff with himself.⁹ The correctness of this decision may well be doubted in the light of the other

¹ *Lewis v. Graham*, 4 Abb. Pr. 106; *St. Anthony's Mill Co. v. Vandall*, 1 Minn. 246.

² *Cummins v. Barkalow*, 4 Keyes, 514.

³ *Slocum v. Barry*, 34 How. Pr. 320; *Dix v. Akers*, 30 Ind. 481; *Musselman v. Cravens*, 47 Ind. 4.

⁴ *Runk v. St. John*, 29 Barb. 585; *per contra*, *Hope Life Ins. Co. v. Taylor*, 2 Robt. 278.

⁵ *Goodrich v. Milwaukee*, 24 Wisc. 422;

Boardman v. Beckwith, 18 Iowa, 292, 295.

⁶ *Gardlinier v. Kellogg*, 14 Wisc. 605.

See Davidson v. Elms, 67 N. C. 228;

Thompson v. Toland, 48 Cal. 99, 114;

Moorehead v. Hyde, 38 Iowa, 382.

⁷ *Kimball v. Spicer*, 12 Wisc. 668.

⁸ *Reed v. Harris*, 7 Robt. 151.

⁹ *Bardstown, &c. R. R. v. Metcalfe*, 4 Metc. (Ky.) 199.

cases above cited, which uniformly proceed upon a different doctrine.

§ 179. Many public officers are authorized by law to bring actions in their own names, and by virtue of their official character, in respect of matters falling within the scope of their official functions. As this subject is entirely regulated by special statutes, which greatly vary in different States, and as it is not in fact a portion of the general civil procedure, but rather a matter exceptional and collateral thereto, I shall not attempt any discussion of the cases in which such officers may sue, but shall simply mention a few decisions which may have some general interest. Actions by public officers suing as such should be brought in their individual names, but with their official titles added;¹ but the mere use of the official title will not be enough, without the proper averments of the official character in the pleadings; in the absence of such averments, the title will be regarded as only a description of the person.² In New York, counties cannot sue nor be sued. All actions and judicial proceedings in favor of or against counties, except those which some county officer is expressly authorized to maintain in his own name for the benefit of the county, must be brought by or against the "Board of Supervisors" of the county named, as an organized unit, and by that designation, and not against the supervisors individually;³ but when the action is by or against the supervisors, not as the immediate representatives and in the place of the county, it must be brought by or against them individually, with their title of office added.⁴ The rule in respect to towns in New York is different. They are municipal corporations, and *must* sue and be sued by their corporate name, except in the few cases where town officers are expressly authorized by statute to sue in their name of office for the benefit of the town.⁵ In accordance with this rule, where the supervisor and commissioner of highways had entered into a contract on behalf of the town, which contained no promise to or undertaking with themselves, as such officers, it was held that they could not maintain an action upon it in their joint names, but the action should have

¹ *Paige v. Fazackerly*, 36 Barb. 392.

⁴ *Wild v. Board of Supervisors*, 9 How.

² *Gould v. Glass*, 19 Barb. 179.

Pr. 315, per Harris J.

³ *Hill v. Board of Supervisors of Livingston County*, 12 N. Y. 52; *Magee v.*

⁵ *Town of Duanesburgh v. Jenkins*, 46

Cutler, 43 Barb. 239.

been by the town, as the real party in interest.¹ The Secretary of State for the War Department of Great Britain was permitted to sue in his individual name to recover public moneys which had been embezzled by a subordinate official, it being shown that by the British statute the property was vested in him as such secretary.² The "Metropolitan Fire Department," a commission created by statute for the city of New York, is declared to be a *quasi* corporation, capable of suing and being sued, and not a mere official agency of the municipality.³

§ 180. Hardly any attempt has been made by the courts to determine in a general manner the classes of persons who fall within the designation of "expressly authorized by statute" to sue. The Supreme Court of Indiana in one case made an approach towards such an interpretation. In an action upon a promissory note by the assignee thereof, his right to sue was denied by the defendant. The evidence tended to show that he was not the real party in interest. To meet this objection, he invoked a prior general statute, which expressly provides that indorsees and assignees of bills and notes may sue in their own names, and urged that he was thus brought directly within the class of "persons expressly authorized by statute" mentioned in the section of the code under consideration. The court, however, refused to adopt this construction of the code. It said: "Is the assignee of a note who holds it as such, without any real interest, one of that class of persons here referred to as being 'expressly authorized by statute to sue'? or does the provision have reference to another class of persons, such as the guardians of an idiot, &c.? We are of the opinion that the clause of the section above quoted does not have reference to the rights of an assignee of a promissory note, but to such persons as may be authorized to sue in their own names because of holding some official position, as the president of a bank, the trustee of a civil township, and the like."⁴ There have been held embraced within the same class, not only the presidents and other managing officers of joint-stock associations for business purposes, but also similar officers of some voluntary societies organized for purposes not connected with

¹ *Palmer v. Fort Plain, &c. Plank R. Co.*, 11 N. Y. 876, 890, per Selden J. "A town is a political corporation, and suits in its behalf must be prosecuted in the name of the town." See *supra*, § 174.

² *Peel v. Elliott*, 7 Abb. Pr. 433.

³ *Clarissy v. Metropolitan Fire Dep.*, 7 Abb. Pr. n. s. 352.

⁴ *Swift v. Ellsworth*, 10 Ind. 205, per Hanna J.

business, when the action is brought on behalf of, or in relation to matters belonging to, the society, and among other instances the following: a suit brought by the president of a voluntary unincorporated religious and missionary association to recover a legacy bequeathed to it;¹ by the treasurer of a division of the Sons of Temperance, a voluntary social organization;² by the president of a bank of which he was the nominal proprietor, all the contracts and transactions being in his name as such proprietor;³ by the trustee of the "Pittsburg Trust Company," an unincorporated business association, in an action brought to recover damages for negligence in not protesting a bill of exchange belonging to such association, by which the amount thereof was lost.⁴ An officer of the Bank of England was permitted to sue in New York upon a bill of exchange belonging to the bank, by showing that the statutes of England authorized him to bring an action.⁵ On the other hand, it has been held in the same State that an action brought by a person as foreman of a certain named fire company — unincorporated — could not be maintained; that the provisions of the code and of other statutes authorizing suits in the name of officers of unincorporated bodies do not apply to such societies as fire companies.⁶ If the doctrine stated by the Indiana court cited above be taken as the correct interpretation of the clause, it follows that the whole section provides for three classes of persons who may sue in their own name, although not the real parties in interest; namely, *first*, those with whom, or in whose name, a contract is made for the benefit of another, to whom the promise is directly given, and who sue because they are the actual promisees; *secondly*, trustees proper of an express trust, who, by virtue of being *trustees*, have an interest in or title to some property which is the subject-matter of the trust; and, *thirdly*, certain persons clothed with authority to do various acts for, or in behalf of, others, but who are not vested with any interest in or title to property, so as to render them

¹ DeWitt v. Chandler, 11 Abb. Pr. 469 (General Term). It was held that the action might be maintained under statutes of 1848, 1849; citing Tibbetts v. Blood, 21 Barb. 650.

² Tibbetts v. Blood, 21 Barb. 650; expressly holding that these statutes are not confined to business associations.

³ Burbank v. Beach, 15 Barb. 826.

⁴ Laughlin v. Greene, 14 Iowa, 92, 94. The plaintiff was said to be a trustee of an express trust.

⁵ Myers v. Machado, 6 Abb. Pr. 198.

⁶ Masterson v. Botts, 4 Abb. Pr. 130 (Sp. T.).

trustees in the strict meaning of that term, and who are authorized by various statutes to maintain actions in the exercise of their personal authority, such as officers of voluntary societies, guardians, or committees of the person, and the like.

§ 181. That executors and administrators can maintain actions relating to the estate in their own names alone, is a proposition too familiar and elementary to require discussion or the citation of authority. Although in general a foreign executor or administrator cannot sue as such in the courts of another State or country than that in which he was appointed, yet, if the objection is not raised by answer or demurrer, it is waived under the codes of procedure; that is, the objection goes simply to the parties' capacity to sue, and not to the cause of action set up in the complaint or petition.¹ In California, lands owned in fee by the deceased do not descend at once to his heirs or pass to his devisees, but go with the personalty into the estate in the hands of his administrator or executor as a part of the assets to be administered upon. Any action, therefore, relating to such land, — to recover its possession, or damages for injuries done to it, or rents, or the like, — brought at any time before a final settlement of the estate and distribution thereof, must be prosecuted by the administrator or executor alone.² In an action by the administrator of a mortgagee, brought to foreclose the mortgage, the heir of the mortgagee is not a proper party to be joined as a coplaintiff. In California, as in New York, the mortgage is a mere security, incident and collateral to the debt, and belongs wholly to the personalty.³

§ 182. How far general guardians of infants, testamentary or appointed by the probate courts, are authorized to maintain actions in their own names, relating to the personal property of their wards, depends rather upon the provisions of the statutes which define their powers and duties than upon those of the codes. The codes in general can hardly be deemed to have enlarged their powers in this respect. In a few States, the guardian is specifically mentioned and coupled with the executor and administrator in the section of the statute under consideration; and this language may be interpreted as authorizing him to sue in respect of all

¹ *Robbins v. Wells*, 18 Abb. Pr. 191. *Wiggins*, 28 Cal. 16; *Emeric v. Penniman*,

² *Curtis v. Herrick*, 14 Cal. 117; 26 Cal. 119.

Meeks v. Hahn, 20 Cal. 620; *Grattan v.* ³ *Grattan v. Wiggins*, 28 Cal. 16.

property which is under his control by virtue of his office.¹ In New York, it has been determined by the Supreme Court in a very carefully considered case, the decision, however, being rested upon a construction of the Revised Statutes, and not of the code, that the general guardian may bring all actions in his own name respecting the personal property of the ward and the rents and profits of his real estate.² This same power is expressly conferred upon him by the statutes of certain States.³ On the other hand, it is held in Kentucky that, while the guardian, who has taken a note expressly made to himself as payee for moneys belonging to the ward, may prosecute an action thereon, because the promise is given directly to him, he cannot sue in respect of his ward's property in general, since he has no estate or interest therein; such actions must be brought in the name of the infant.⁴ The statutes which provide for the appointment of guardians or committees over the property of lunatics, confirmed drunkards, and other such persons not *sui juris*, generally confer upon them the same powers that are given to the general guardians of infants, and a similar rule should therefore prevail in reference to their prosecution of actions. Although there is some conflict in the decided cases, yet, as these guardians or committees do not acquire any estate or interest in the property subjected to their control, but only a power of possession and management, the correct doctrine upon principle would seem to be that they cannot maintain actions concerning it in their own names, unless expressly authorized to do so by statute; other actions may be brought by them.⁵

¹ This interpretation is given to the language of the code by the Supreme Court of Indiana in *Shepherd v. Evans*, 9 Ind. 260, which holds that, by virtue of the provision, the guardian is empowered to bring such actions in his own name.

² *Thomas v. Bennett*, 56 Barb. 197; *Seaton v. Davis*, 1 N. Y. Sup. Ct. 91; and see *White v. Parker*, 8 Barb. 48, 52; *Mebane v. Mebane*, 66 N. C. 384; *Biggs v. Williams*, 66 N. C. 427.

³ See R. S. of Wisc. ch. 112, §§ 28, 47.

⁴ *Anderson v. Watson*, 8 Metc. (Ky.) 609.

⁵ *King v. Cutts*, 24 Wisc. 625; *McKillip v. McKillip*, 8 Barb. 552. But, *per contra*, see *Person v. Warren*, 14 Barb.

488, which expressly holds that the committee is a "trustee of an express trust" within the meaning of the code. The whole subject was discussed and determined in the very late case of *Fields v. Fowler*, 4 N. Y. Sup. Ct. 598. The action was brought by the committee of the person and estate of a lunatic to set aside the sale of a farm made by defendant to the lunatic, to cancel the satisfaction of a mortgage which had been executed by him, and also a check which he had given on such sale. The action was held to be properly brought by the committee. E. Darwin Smith J., in giving the opinion of the court, says: "The rule undoubtedly was, and still is, at law, where the action

SECTION SIXTH.

WHO MAY BE JOINED AS PLAINTIFFS.

§ 183. The following are the provisions relating to the joinder of parties plaintiff in one action found in the various State codes, and it will be seen that there is an absolute identity of language in all the legislation upon this subject. "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title."¹ This is the important section; but the following one somewhat enlarges its scope and effect in certain cases: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint [petition]."² The particular statutory rules relating to married women as parties, and prescribing when wives may sue alone or when husbands must be joined, will be stated in a subsequent portion of this section. Many of these special enactments are not found in the codes of procedure, but in separate and independent legislation.

§ 184. *The Common-law Rules.* Before entering upon the interpretation of these statutory provisions, and before discussing

is brought to assert the title of the lunatic to real and personal property, it must be brought in his name, as held in *McKillip v. McKillip*, 8 Barb. 552." He cites the laws of 1845, ch. 112, which authorize the committee to sue for any debt, claim, or demand transferred to them, or to the possession and control of which they are entitled; also *Gorham v. Gorham*, 3 Barb. Ch. 82; *Ortley v. Messere*, 7 Johns. Ch. 189, and § 111 of the code, and reaches the conclusion that the equity rule as to parties is controlling in actions of this kind. The decision in *Person v. Warren*, 14 Barb. 488, is expressly approved and followed. *S. P. Bears v. Montgomery*, 46 Ind. 544.

² New York, § 117; Ohio, § 84; Indiana, § 17; Kansas, § 85; California,

§§ 378, 881; Missouri, art. 1, § 4; Wisconsin, ch. 122, § 18; Iowa, § 2545; Nebraska, § 87; Florida, § 68; Kentucky, § 84; South Carolina, § 140; Nevada, § 12; Dakota, § 70; Oregon, § 380: but limited to equitable actions; North Carolina, § 60; Idaho, § 12; Washington, § 8; Montana, § 12; Arizona, § 12; Wyoming, § 40.

¹ New York, § 119; Indiana, § 19; California, § 882; Wisconsin, ch. 122, § 20; Florida, § 70; South Carolina, § 142; Dakota, § 72; Oregon, § 381, but limited to equity actions; Nevada, § 14; Ohio, § 86; Kansas, § 87; Iowa, § 2548; Nebraska, § 89; Kentucky, § 86; Missouri, art. 1, § 6; North Carolina, § 62; Idaho, § 14; Washington, § 8; Montana, § 14; Arizona, § 14; Wyoming, § 42

the doctrine of parties plaintiff with respect to their uniting or severing in an action in the reformed American system of procedure, it will be advantageous and even necessary to state in a brief but comprehensive manner the rules which prevailed at the common law, unchanged by legislation. The common law, in respect to the union of defendants, divided liabilities into joint, joint and several, and several ; in respect to the union of plaintiffs, it divided all rights into joint, and several. The requirements that all the persons jointly interested should unite as plaintiffs in any action brought to maintain the interest, and that, in the case of a several right, each separate holder of it should sue alone, were very peremptory, and upon them were based the form, extent, and even possibility of the judgment to be recovered. All the possible occasions from which could arise the two classes of rights, joint or several, and which could give an opportunity for the distinction into these two classes, are (1) contracts in which the rights of the obligees, covenantees, or promisees may be joint or several ; (2) wrongs to person, character, or property, not consisting in the breach of contracts ; (3) property in land, in respect of which there may be joint ownership, ownership in common, and several ownership ; (4) property in chattels, in respect of which there may be joint ownership, ownership in common, and several ownership. These are all the occasions which can give rise to joint or several rights. But the possessors of the rights which spring into existence upon these occasions may themselves be separated into two classes,—those who hold of their own right, and those who hold in a representative character or capacity, as executors, administrators, and trustees of all kinds. To these must also be added the special case of husband and wife ; and it is to be determined when they should be united as plaintiffs, and when the husband should sue alone. I shall take up these classes in the order indicated, and shall state the common-law rules in reference to the union or severance of parties plaintiff in a legal action, as laid down by text-writers of the most approved authority, but without any discussion of the doctrine or illustration by examples.

§ 185. *First, the rights which arise from contracts.* When a contract, either sealed, written, or verbal, is made with two or more persons, and their *legal interest* therein is joint, all the obligees, covenantees, or promisees, if living, and as many as are

living, must join as plaintiffs, even though the covenant or promise to them is *in terms joint and several*. The interest spoken of is not the interest which will be had in the sum of money or other benefit promised when the agreement is performed, but the interest in the contract, the legal, technical interest created by the terms of the very agreement.¹ This rule as to the union of parties plaintiff in an action brought upon a joint contract being thus universal and peremptory, it becomes a matter of the utmost importance to determine when a contract is thus joint; when the rights of the promisees, or their *legal interest* in the contract, is joint, and not several. In general, if a promise is made to two or more persons, the right is presumptively joint; a several right is the exception. No express joint words, therefore, are necessary; but some words indicating such an interest must be used to create a several right. A mere promise to A. and B. always creates a joint right,² even though the share of the money promised which each is to have is designated.³ The following examples of contracts in which the rights and interests were held to be joint are given as illustrations of this general doctrine. Where one of a firm of bankers had loaned money, all the partners may join in an action to recover it.⁴ An agent of three part-owners of a ship sold the vessel, and paid over their respective shares of the price to two of them; it was held that the three must unite in an action to recover the other share, payment of which had been refused; the implied promise was to all the owners jointly.⁵ A. conveyed land to several persons, and in the deed covenanted with them, "and to and with each and every of them," that he was lawfully seised: all the grantees were required to join in an action on this covenant.⁶ When one covenants with A. and B. to pay a sum of money to A., both must unite in a suit to recover the money; there is a *joint interest in the contract*, although A. is the only one interested in the benefit which is to result from its performance.⁷

¹ 1 Chitty Pl. Springfield ed. 1840, p. 8 a; Eccleston v. Clipsham, 1 Wm. Saund. 153, n. 1; Anderson v. Martindale, 1 East, 497, 501; Hill v. Tucker, 1 Taunt. 7; James v. Emery, 5 Price, 529; Hatsall v. Griffith, 4 Tyr. 487; Wright v. Post, 8 Conn. 142.

² Hill v. Tucker, 1 Taunt. 7; King v. Hoare, 18 M. & W. 499, per Parke B.; Yorks v. Peck, 14 Barb. 644.

³ Lane v. Drinkwater, 1 C., M. & R. 599; Byrne v. Fitzhugh, 1 C., M. & R. 618, n.

⁴ Alexander v. Barker, 2 Tyr. 140.

⁵ Hatsall v. Griffith, 4 Tyr. 487.

⁶ Slingsby's Case, 5 Rep. 18 b, 3 Levinz, 160, Dyer, 387.

⁷ Anderson v. Martindale, 1 East, 497.

The interest of the promisees or covenantees is the important, and, as the rule is laid down by the text-writers and by most of the cases, the *sole* criterion by which to decide whether the right is joint or several. If this interest—that is, the legal interest in the contract—is joint, the right is joint; if several, the right is several. It has been said that no language of the agreement, indicating that the right is to be several, will avail when the *interest* is clearly joint, and no language will avail to make the right joint, when the interest is clearly several.¹ Some English cases, however, have modified this doctrine, and have denied that the interest is to be the sole criterion, holding that the express language may control the effect of the interest.² There is no such thing as a joint and several right as there is a joint and several liability. It is either several, so that each of the promisees *must* sue separately; or joint, so that all *must* sue together. The parties never have the option to sue jointly or severally at their pleasure.³ When a contract is made with a partnership, all the members of the firm must join; even when the promise is nominally to one of the partners alone, if it is intended for the benefit of all, all must sue.⁴ A dormant partner, however, need not be joined.⁵

§ 186. Where the legal interest in the contract or the cause of action is several, the covenantees or promisees must sue separately, although the agreement is in its terms joint.⁶ The following are some illustrations of contracts in which the interests and the consequent rights of action are several. If a man demises Whiteacre to A. and Blackacre to B., and covenants with

¹ See the foregoing cases; also *Hopkinson v. Lee*, 6 Q. B. 971, 972, per Lord Denman; *Withers v. Bircham*, 8 B. & C. 254; *Servante v. James*, 10 B. & C. 410.

² *Sorsbie v. Park*, 12 M. & W. 146, 157, per Lord Abinger, p. 158, per Parke B.; *Mills v. Ladbroke*, 7 Man. & Gr. 218; *Bradburne v. Botfield*, 14 M. & W. 559, 572; *Keightley v. Watson*, 8 Exch. 716.

³ *Slingsby's Case*, 5 Rep. 19 a; *Eccleston v. Clipsham*, 1 Wm. Saund. 158; *Petrie v. Bury*, 8 B. & C. 353; *Scott v. Godwin*, 1 B. & P. 67, 71; *James v. Emery*, 5 Price, 583, per Gibbs C. J.; *Foley v. Addenbroke*, 4 Q. B. 197; *Keightley v. Watson*, 8 Exch. 721, per Pollock C. B., p. 723, per Parke B., p. 726, per

Rolfe B. Most of these cases arose upon covenants, but the same rules certainly apply to simple contracts.

⁴ 1 Ch. Pl., same ed., p. 11; *Garrett v. Handley*, 4 B. & C. 664.

⁵ *Clark v. Miller*, 4 Wend. 628; *Clarkson v. Carter*, 3 Cow. 85; *Lord v. Baldwin*, 6 Pick. 848, 852; *Leveck v. Shaftoe*, 1 Esp. 468; *Lloyd v. Archbowle*, 2 Taunt. 324.

⁶ *Slingsby's Case*, 5 Rep. 18 b; *Eccleston v. Clipsham*, 1 Wm. Saund. 158, n. 1; *James v. Emery*, 5 Price, 529; *James v. Emery*, 8 Taunt. 245; *Dunham v. Gillis*, 8 Mass. 462; *Baker v. Jewell*, 6 Mass. 460; *Gould v. Gould*, 6 Wend. 238; 1 Ch. Pl., same ed., p. 10.

them and with each of them — or even, it seems, if he covenants with them in express terms jointly — that he is the owner of the closes, each must sue separately in respect of his distinct interests; they cannot sue jointly, for they have no joint or entire interest in the same subject-matter.¹ If a person promises A. and B. to pay a different sum to each, although the mere terms of the promise are joint, the interest is several, and each must sue separately.² *A fortiori*, if, instead of one promise to all, there are separate promises of distinct sums to each in the same instrument, the interests and consequent rights will be several.³ When three persons were assignees of a bankrupt, and two of them paid one-half each of the attorney's bill, it was held that they could not maintain a joint action against the third for his proportion of the money paid; each was interested alone in the implied promise to refund to him a portion of the money he had advanced.⁴ But if the two had borrowed on their joint account the money which they paid, or if their attorney had paid it for them on their joint account, they would have had a common interest in the entire sum paid, and in the implied promise to repay, and could have maintained a joint action for it.⁵

§ 187. Joint owners of land must sue jointly upon any contract relating to the estate.⁶ When owners in common, even if holding by distinct titles, jointly let, reserving an entire rent, they may and perhaps must unite in an action to recover the rent;⁷ but if the rent be reserved to them separately in distinct parts, they must sue separately.⁸

§ 188. If of the joint obligees, covenantees, or promisees, one dies, the action must be brought by the survivors; the executors or administrators of the deceased cannot be joined as co-plaintiffs, nor can they sue separately. If all die, the suit must be by the personal representatives of the last survivor. If, how-

¹ Cases cited in last note, and *Withers v. Bircham*, 8 B. & C. 254.

² *Ibid.*

³ *Servante v. James*, 10 B. & C. 410; *Ford v. Bronaugh*, 11 B. Mon. 14.

⁴ *Brand v. Boulcott*, 8 B. & P. 285. See *Yates v. Froot*, 12 Johns. 1; *Gould v. Gould*, 8 Cow. 168.

⁵ 1 Ch. Pl., same ed., p. 11; *Osborne v. Harper*, 5 East, 225; *Doremus v. Selden*, 19 Johns. 213, 217.

⁶ 1 Ch. Pl., same ed., p. 13; *Bac. Abr. Joint Tenants*, K; *Scott v. Godwin*, 1 B. & P. 67.

⁷ 1 Ch. Pl., same ed., p. 13; *Martin v. Crompe*, 1 Lord Raym. 840; *Harrison v. Barnby*, 5 T. R. 249; *Powis v. Smith*, 5 B. & A. 851; *Wilkinson v. Hall*, 1 Bing. N. C. 718.

⁸ *Ibid.* *Bac. Abr. Joint Tenants*, K.

ever, the right is several, the executors or administrators of the decedent may bring an action, although the others are living.¹ The consequences of a non-compliance with these rules were at the common law very serious. If a plaintiff omitted to join another as coplaintiff who should have been joined, or if persons were improperly joined as coplaintiffs, and the error appeared upon the face of the pleadings, it was fatal on demurrer, or in arrest of judgment, or on a writ of error. If the error did not appear on the face of the pleadings, the defendant might take advantage of it either by a plea in abatement, or by a motion for a nonsuit at the trial, or by proof under the general issue.²

§ 189. *Second. Rights which arise from Torts to Property, Person, or Character.* Persons jointly entitled, or having a joint legal interest in the property or other rights affected by the tort, must join in actions brought to recover damages therefor. On the other hand, when the interest and right, and the damage are both several, each person who has suffered the wrong must sue separately. In accordance with this principle, two or more plaintiffs cannot, in general, sue for torts to the person or character, such as assaults and batteries, false imprisonments, libels, slanders, and the like. But if a joint right is invaded by a personal wrong, and joint damage is done thereby, the injured parties may unite in the action; as, for example, partners may sue jointly for a libel or slander upon the firm as such, by which injury is done to the common business.³

§ 190. Joint owners and owners in common of personal property must unite in actions brought to recover damages for any injuries to it, or for the wrongful taking or conversion of it, and in actions to recover its possession; but persons having a several interest must sue separately.⁴ Joint owners of land must unite in all real actions relating to it, and also in all personal actions. Owners in common must, however, in general, sever in real actions to recover their interests in the land, and in the action of ejectment; but in personal actions for injuries, such as trespass,

¹ 1 Ch. Pl., same ed., p. 19; *Rolls v. Yate*, Yelv. 177; *Anderson v. Martindale*, 1 East, 497; *Stowell's Administrator v. Drake*, 3 Zab. 310; *Shaw v. Sherwood*, Cro. Eliz. 729.

6 Mass. 460; *Converse v. Symmes*, 10 Mass. 377; *Dob. v. Halsey*, 16 Johns. 34.

² 1 Ch. Pl., same ed., p. 64; *Cole v. Turner*, 6 Mod. 149; *Gazynski v. Colburn*, 11 Cush. 10.

³ 1 Ch. Pl., same ed., p. 18; *Armine v. Spencer*, 4 Wend. 406; *Baker v. Jewell*,

⁴ 1 Ch. Pl., same ed., p. 65.

nuisance, and the like, they *may* join. It was the rule in New York, however, that tenants in common might declare in ejectment upon a joint demise.¹ In all these actions *ex delicto*, for torts to person or property, the objection to a *non-joinder* of proper parties plaintiff, when it existed at all, could only be taken advantage of by a plea in abatement, or by an apportionment of damages at the trial; the defendant could not demur, nor move for a nonsuit, nor prove the defect under the general issue. If, however, the objection was to the *mis-joinder* of improper parties plaintiff, the same rules prevailed as in actions *ex contractu*.²

§ 191. *Third. The Case of Husband and Wife.* As the wife's chattels became absolutely the property of the husband at the marriage, actions for the recovery of such chattels belonging to the wife prior to the marriage must be brought in the name of the husband alone. Things in action which had belonged to the wife did not become the absolute property of the husband by the mere fact of marriage, and if he died before reducing them to his possession, and before her death, they survived to her. The rule therefore was, that in actions upon such demands the husband and wife must unite as coplaintiffs, as also in an action to recover rent which had accrued to her before the marriage. For rent or other cause of action arising *during* the coverture on a lease, or on any other contract relating to the wife's land, the parties *might* join, or the husband might sue alone at his election.³ In actions for injuries to the wife's person or to her property, real or personal, done before the marriage, when the cause of action would survive to her after his death, both must join as plaintiffs; except, as has just been said, in detinue or replevin for chattels which had belonged to the wife, but which had become the husband's by an absolute ownership, he must sue alone. For any personal injuries to the wife during the marriage, — assault and battery, false imprisonment, libel, slander, and injuries through negligence or want of skill, and the like, — she could never maintain an action in her own name; the husband and wife *must* sue jointly to recover damages for the wrong inflicted upon *her*, for her sufferings bodily and mental, while for damages sustained by him by reason of the deprivation of her society, or

¹ 1 Ch. Pl., same ed., p. 65.

² *Ibid.* p. 66.

³ *Ibid.* pp. 28, 29.

by reason of the expenses to which he was put, and the like, the husband *must* sue alone.¹ Finally, for torts committed to the wife's personal property during the marriage the husband only could sue; both must unite in real actions or in ejectment to recover her lands; while in actions to recover damages for torts done to her lands during the coverture, the wife might be joined as a coplaintiff, or the husband might sue alone.²

§ 192. The foregoing rules of the common law, although arbitrary and technical in the highest degree, and although supported only by that sort of reasoning in which the old law so much delighted, and which consisted in the repetition of verbal formulas without any real meaning, were maintained and enforced without exception, and with little or no variation until the adoption of the codes of procedure in the several States. The common law, it is plain, conceived of a joint right as a very peculiar and very important matter; it was one individual entity, not an assemblage of the individual rights belonging to the several persons who held it. In fact, according to the strict legal notion, there was no such individual right in any one of the joint holders. This is apparent from the primitive rule of the common law as to survivorship. According to that rule, if A., B., and C. held a joint right arising even from contract, and B. died, his whole interest and claim was ended, and nothing passed to his personal representatives. It was not simply the case of survivors holding and suing for the benefit of the deceased's estate; the survivors held and sued for their own use alone; all right was centred in them; where a single survivor remained and he died, as the entire ownership or right of action had been collected in him, so it passed to his administrators or executors as part of his estate. Equity did, it is true, afterwards change this doctrine in respect of rights of action arising from contract, and conferred upon the estate of the decedent who had been jointly interested with the living, a share in the contract or in its proceeds, and made the survivors accountable to the representatives of such estate; but this, it should be remembered, was a radical innovation upon the ancient integrity of the common law. Combining the legal and the equitable doctrines upon this subject-matter as they stood prior to the codes, and the result was the possession of an undivided interest by the estate of the

¹ 1 Ch. Pl., same ed., p. 73.

² Ibid. p. 74.

decendent, which equity created and alone protected by a direct action, authorized to be brought by his personal representatives; the surviving covenantees or promisees, on the other hand, could alone maintain actions in courts of law as though they were the sole owners of the demand, but at the same time they could be required to account, and to pay over to the executors or administrators of their deceased copromisee the share of the proceeds equitably belonging to his estate.

§ 193. The rules in regard to parties and those in regard to the forms of judgment reacted upon each other. The joint right being conceived of as a single entity, although residing in two or more persons, the judgment must establish or defeat it as a whole; the notion of severing it and establishing a part in favor of certain plaintiffs, and defeating a part as against certain other plaintiffs, could not be entertained, and was violently opposed to all the common-law theories. Exactly the persons in whom collectively the legal right resided, no more and no less, must be united as plaintiffs, or else the proceeding would wholly fail. The reason repeated from court to court, and solemnly put forth as the ground of this common-law rule, was, that all persons jointly interested must unite as plaintiffs, and no one of them should be permitted to sue alone, because otherwise the defendant would be exposed to two or more judgments and recoveries for the same demand, which would be manifestly unjust. This formula was gravely repeated by the judges, and at the same time each one of the separate parties to a several contract was permitted to bring a distinct action, and to recover a judgment for the whole demand and costs, the court providing, however, that there should be but one payment and satisfaction of the claim. What it was thus perfectly easy to do in the case of a several right, was equally practicable in the case of a right called joint; and the judges proved the utter emptiness of their reasoning by permitting a proceeding in the one instance which they asserted to be impossible in another. In fact, in every instance of several rights against the same defendant, or of a several liability due from two or more defendants, the common-law courts allowed as many actions as there were plaintiffs in the one case, and as there were defendants in the other, and protected the rights of all the parties with justice and equality by controlling the executions and permitting but one enforcement and satisfaction of the actu-

ally single demand. This practice demonstrates the worthlessness,—the utter want of any *foundation of fact*,—of the argument uniformly urged against the possibility of allowing separate actions by persons clothed with joint rights; the argument was a mere formula of words, and nothing more. The same is equally true of the common-law doctrine respecting survivorship. When courts of equity introduced the notion that the right does not belong alone to the survivors of joint promisees, but is shared also by the estate of the deceased party, they *abolished* the ancient dogma in fact, although this result was not openly proclaimed by them, but was described by the maxim, “Equity regards joint rights as joint and several.” As soon as the original doctrine was changed, and it came to be admitted that, upon the death of one or more joint covenantees, obligees, or promisees, the entire right did not remain in the survivors, there was nothing whatever in the nature of the relation which forbade the uniting of the survivors and the personal representatives of the deceased as co-plaintiffs in the same action to enforce the right, or which forbade the personal representatives from suing alone in courts of law. If we examine in this manner all the so-called judicial reasoning which was repeated by judge after judge from an early day in support of the common-law rules concerning parties and concerning the forms of judgments as dependent upon the parties, we shall find that it simply *lacks the basis of fact*, since the very proceedings and acts which it assumes or declares to be impossible have since been adopted and practised without the slightest inconvenience. For example, the common-law judges asserted that persons having a joint right of action could not sue separately, because otherwise the debtor would be subjected to cumulative recoveries; but such severance is permitted in many States, and is a matter of daily occurrence, without any practical harm to defendants. The common-law judges denied the possibility of the surviving joint creditors and the representatives of the deceased being united as plaintiffs in an action on the demand; but such a joinder of parties is authorized, and found to be in every respect practicable. Again, the common-law courts said that a misjoinder of plaintiffs in a suit brought upon a joint contract must be fatal to any recovery, because it was impossible for the judgment to be divided and to be rendered against the defendants in favor of some plaintiffs, and in favor of the same defendants against

the other plaintiffs ; but in fact such a judgment is just as possible in the case of contracts as in that of torts, and is a familiar feature of the reformed procedure in many of the States. The common-law rules relating to parties and to the rendition of judgments, as affected by the state of the parties, are thus shown to have been technical and arbitrary in the highest degree ; the penalties for their violation were extremely onerous, amounting in most instances to an absolute denial of justice, while the reasons upon which they were based were a mere form of empty words, conveying no real meaning, and resting upon no foundation of actual fact. The system, like much else of the ancient common law, was the result of severely logical deductions from premises which had no real existence — no existence except in the imagination of the judges who adopted them. The strictly logical methods which the schoolmen of the middle ages were accustomed to employ, were taken and applied bodily in the practical administration of justice ; from the use of a single word alone, such as “ joint ” or “ several,” rules were deduced by which the legal rights of suitors were determined without the slightest concern for or reference to the requirements of justice and the equities of the particular case.

§ 194. *The Fundamental Principles of the Reformed Procedure ; the General Intent of the Legislature in its Adoption.* With the foregoing statement in outline of the common-law rules as to parties plaintiff, the first questions which suggest themselves, and demand a full discussion, are : How far have those rules been abrogated or modified by the provisions contained in the codes of procedure ? What is the interpretation to be put upon those provisions ? What was the general intention of the legislature, and how far has that intention been embodied in the statute so as to produce a practical result in the administration of justice ? The nature and extent of the change must depend upon the legislative intent expressed in a manner sufficiently clear and positive to effect an alteration in the former system. It must, of course, be assumed at the outset that these doctrines and rules of the common law still remain in full force, except so far as they have been abolished by the reformatory legislation, and others substituted in their stead. It may be demonstrated that the ancient rules rest upon no basis of principle, and that the reasoning which supported them is fallacious ; all this, however, would not

of itself work their destruction. They had become established as positive, peremptory regulations, binding upon the courts as though enacted by the legislature, and nothing but the legislative authority exercised in the form of a statute would avail to abolish them. I shall, therefore, endeavor to discover, if possible, the legislative intent, and shall seek for it first in the language of the codes.

§ 195. It must be conceded at once that there is no repeal or modification of these common-law rules in detail; the requirements of the old law as to joint and several rights, and the union or severance of the parties holding such rights, are not in any express manner referred to. It should also be carefully observed — and the fact is one of great practical importance — that the provisions in the various codes relating to parties plaintiff are not so full, minute, and express as those relating to parties defendant. Even in those State codes where the common-law distinctions between joint, joint and several, and several *liabilities* are utterly abolished, and the practical requirements as to the union or severance of parties *defendant* based upon them are wholly swept away, there is no corresponding express legislation as to the distinctions between joint and several *rights* and the union or severance of *plaintiffs*. This difference in the mode of treatment may be made the ground — and has been by many judges — of inferring that the legislature intended to leave the ancient legal doctrines as to plaintiffs untouched, and to confine its work of reform to the case of defendants. The legislative intent, therefore, whatever it may be, must be found in the few general provisions quoted at the commencement of the present section, and in the subsequent provisions which regulate the rendition of judgments, so far as the same depends upon or is connected with the parties to an action. Referring to these provisions, it is plain that their language is general, inclusive, without exception, and applying alike to all kinds and classes of actions. Whatever doctrines in reference to parties plaintiff the legislature has adopted, whatever regulations it has established, its intention, as shown by the language of all the codes, but one or two, is to apply them equally to legal and to equitable actions. No exception being made, nor even suggested, the courts cannot, unless by an act of positive legislation, by an act of direct usurpation, create an exception, and say that these general terms were intended to

apply to equitable suits alone, while legal actions were intended to be left outside of their scope and effect.

§ 196. These statutory provisions themselves are confessedly an enactment, with hardly a verbal change, of the general principles long ago established by courts of equity for the regulation of the parties plaintiff in suits pending before them. The legislature has, therefore, in a very brief but comprehensive form, adopted the equitable doctrine, and has applied it to the civil action required to be used in the enforcement of all rights and the pursuit of all remedies, whether legal or equitable. This proposition cannot be denied, without denying to the language of the statute its plain meaning and ordinary significance and force. The practical question, then, arises at once, How far is this equitable doctrine inconsistent with the positive rules as to parties plaintiff in legal actions, long established as a part of the common-law procedure? To what extent does it, as thus generally stated, necessarily abrogate or modify these special rules? That *some* change is wrought, if we adhere to the simple language, is very manifest. For example, the common law required that all partners, or other joint contractors, should unite as plaintiffs, and admitted no ordinary exception or excuse for the non-joinder. The new procedure, after requiring, as did the common law, that all those parties "united in interest must be joined as plaintiffs," adds, "but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reasons being stated in the complaint or petition." The practice permitted by this clause was familiar to courts of equity, but was utterly unknown in courts of law. Here, however, it is applied to all actions; no exception is suggested; and if we follow the plain language of the codes, this important alteration is made in the ancient legal rules regulating the parties plaintiff.

§ 197. Assuming that the provisions in relation to plaintiffs are an enactment in a statutory form of the general equitable doctrine in regard to the same subject, and that, as they stand in the codes, they equally embrace within their scope actions of all kinds, legal and equitable, and giving full force to their language, they do not abrogate but rather confirm a large portion of the common-law rules, those, I mean, which required all persons jointly interested to be united as plaintiffs. The general requirements,

"all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs," and "those who are united in interest *must* be joined as plaintiffs," plainly include the case of persons "having an interest in the subject-matter," or "united in interest" by virtue of their being joint obligees, covenantees, or promisees at law, as well as the case of persons having some common equitable interest. The two sections of the codes from which I have quoted do not contemplate nor permit a severance among parties plaintiff when the old law required a joinder; the changes introduced by them rather tend in the opposite direction, and, taking their language simply as it stands, they would seem to allow the uniting of parties plaintiff in many cases where such union was forbidden in legal actions; as, for example, the uniting of survivors of joint promisees and the personal representatives of those deceased. In fact, the practical rule of equity in regard to suits by persons jointly interested, or having a joint right, was the same as that which prevailed at law, with the single exception or addition which provided for the case of a refusal by one or more of the joint holders of the right to unite with their fellows as plaintiffs. In equity, as well as in law, the joint owners of property, and the joint obligees, or covenantees, were in general required to be all made coplaintiffs, but if one or more refused to join, he or they could be made defendants.¹ This equitable doctrine is now, if we accept the express language of the codes, and not the glosses put upon it by some of the courts, extended to all actions alike.

§ 198. As already stated, these sections of the codes, if full force be given to their plain and simple terms, look to a more free union of parties as plaintiffs in the same action than was allowed by the courts of law under the former system. In order to be a proper plaintiff, according to the ancient theory, the person must be interested in the whole of the recovery, so that one judgment could be rendered for all the plaintiffs *in solido*; that a judgment should be given to one plaintiff for a certain sum of money, or for certain lands or chattels, and a judgment for a different sum, or other lands or chattels, be awarded to another plaintiff, was regarded as the sheerest impossibility. The legal notion of sur-

¹ See 1 Daniel's Chan. Pl. (4th Am. ed.), pp. 192, 206, 207, 208, 211, 216.

vivorship forbade the union of the personal representatives of a deceased joint contractor with the others who were living, and even the union of the representatives of all, if all were dead. The text of the codes is broad enough, and explicit enough, if it is taken literally, to abolish these legal restrictions upon the freedom of joining parties as plaintiffs. The clauses, "All persons having *an interest* in the subject of the action, and in obtaining the relief demanded," and "those who are united in interest," do not necessarily require that the interest of all those who are to be united as plaintiffs should be equal or the same, and they do require the union of all those having such an interest without any restriction as to its nature, whether it be legal or equitable. The interest of the survivors of joint obligees, covenantees, or promisees, was, under the ancient system, strictly legal. The interest of the executors or administrators of the deceased joint obligee or promisee was equitable, but was none the less a full interest, for it enabled the estate to obtain its entire portion of the benefit flowing from the contract. The unequivocal language of the codes declares that persons holding this common interest in the subject-matter of the action, or in obtaining the relief demanded, may be united as plaintiffs.

§ 199. In one other class of cases these provisions of the reform legislation would seem to have modified the former practice in legal actions, if their meaning is to be found in their exact terms. At the common law, the different holders of several rights must sue separately, although the rights were created by a single instrument, and although there might be some kind of a common interest; no election was given to bring a joint action by all, or a separate action by each. This rule is directly within the modifying effect of the sections under consideration. "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." The extent of the interest is not the criterion, nor its source nor origin. If the persons have *any* interest, whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit, or arising from the stipulations of the agreement, the language applies without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal. This was the established equity doctrine which in many cases

permitted parties to be united as plaintiffs whose rights were, in a *legal* aspect, not joint, but several. It is possible, indeed it frequently happens, that several rights may be held by two or more persons, who nevertheless have "an interest in the subject of the action and in the relief demanded;" and it would seem that these persons, according to the interpretation given above, may now, if they so elect, join as plaintiffs in bringing a legal action as well as in maintaining an equitable suit.

§ 200. I have thus far intentionally examined the sections of the various State codes which relate to the joinder of parties plaintiff in the civil action, without any reference to judicial authority and construction; I have endeavored to ascertain and to state the object and design of the legislature as the same could be gathered with reasonable certainty from the very words which it has employed. This legislative intent, when the field of investigation is thus limited, depends upon the prior rules controlling the choice of parties plaintiff both in legal and in equitable actions and upon the exact text of the statute itself. I recapitulate the results reached by this analysis: (1) The common-law doctrines defining joint and several rights, and the special rules relating to joint and several actions, are not *specifically* abrogated or modified; whatever changes have been made are the result of very general and comprehensive language used by the legislature. (2) There is a striking difference between the general character of the provisions having reference to plaintiffs and that of the provisions referring to defendants; the latter are more special in their nature, and in many of the States much more reformatory. (3) The new system has, in a very comprehensive form, established the doctrine of equity in regard to the choice and joinder of plaintiffs, and, by making no exceptions or limitations, has applied this doctrine to all actions, whether legal or equitable. (4) The effect of extending this doctrine of equity to legal actions is not to *prevent* the union of parties as coplaintiffs in cases where, on account of a joint right, the common law required such union; the common-law rule making the joinder of all such persons necessary is left unaffected, with the single exception that if one who should regularly be made a plaintiff, in pursuance of such rules, refuses to permit his name to be thus used, he may be made a defendant instead; and this exceptional provision being without limitation or restriction in the text, applies as well to

legal as to equitable actions. (5) Persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs in all actions, whatever be their nature, although the rights of such persons are *legally* several, and although at the common law they would be required to institute separate actions; or, in other words, the plain import of the legislation — its language not being confined to any class of suits — is to enlarge the number of cases in which persons may be joined as coplaintiffs, and to place legal actions in this respect upon exactly the same footing as those which are equitable in their nature. (6) The special rules of the common law as to husband and wife have been entirely abolished in some States by provisions contained in their codes of procedure, and in other States by separate statutes, relating exclusively to the status of marriage.

§ 201. *The General Theory of Judicial Interpretation.* The foregoing results were obtained from an examination of the language alone which the legislatures have used; I shall now proceed to compare them with the general conclusions which have been reached by the courts in their interpretation of the same provisions, and shall thus test their correctness and their value as practical guides in the administration of justice. In pursuing this investigation, the inquiry will at present be confined to those judicial decisions which have dealt with the subject of parties plaintiff, those which discuss the analogous topic of parties defendant being reserved to the succeeding section of this chapter. This course will necessarily produce some repetition of general principles; but as the questions relating to plaintiffs and those relating to defendants arise from provisions of the codes quite different in their scope and import, a separate consideration of them will prevent confusion and uncertainty. I shall *first* ascertain, if possible, and formulate the general theory of construction upon which the courts have proceeded in their decision of special cases; and, *secondly*, shall classify and arrange these cases, and deduce therefrom the particular rules as to the joinder of plaintiffs in the civil action which have been judicially settled as a part of the reformed system of procedure. The number of instances in which the courts have laid down a broad and comprehensive principle of interpretation, which might be the guide in whole classes of adjudications, is very few, and such

a principle must rather be gathered by a process of induction from an analysis and comparison of particular cases. The few attempts at the statement of a general theory which have been made, I shall quote somewhat at length.

§ 202. In an early case, — an action brought by the three obligees in an injunction bond, — the objection was raised that the rights of the plaintiffs were not joint, and that they had been improperly united. Their interests, which had been interfered with by the injunction, were in fact distinct and separate, and it was assumed throughout the judgment that, under the former system, each should have brought a several action on the undertaking. The court, after stating the old rule applicable to the circumstances, proceeded as follows: "We are now to determine this question as it arises under the code of procedure. With the view of embracing all cases, whether of law or equity, and of making them conform to one general rule, the code provides, in § 117, that 'all persons having an interest in the subject of the action and in the relief demanded, may be joined as plaintiffs.' This is now the rule in all cases, whether such as were formerly the subjects of suits in equity or of actions at law, and we are to administer it according to its spirit and true intent, however the practice may differ from the rule that has heretofore prevailed in actions at law. . . . It will be perceived that this case falls within the precise words of the section before cited. All have an interest in the subject of the action and in the relief demanded — that is, in the damages arising out of the operations of the injunction. It is not said to be a joint or an equal or even a common interest, but simply an interest in the subject of the action with the view of doing full justice and settling the rights of all the parties in interest in one suit."¹ The Supreme Court of Ohio has adopted the same principle of interpretation, and has given a construction

¹ *Loomis v. Brown*, 16 Barb. 325, 330, 332, per Gridley, J. In the recent case of *Pelly v. Bowyer* 7 Bush, 518, the Court of Appeals of Kentucky gave a very different construction to the statutory provision. 'The action was brought by several distributees to recover from the administrator the shares found to be due each on a settlement of the estate, and it resulted in a joint judgment for the aggregate amount of such shares. The action, it was held, was entirely irregular. Quoting § 38 of the code, in relation to the joinder of plaintiffs, the court said: "There can be no doubt that in equity actions for the settlement of estates several distributees may unite as plaintiffs. But, except in a particular class of cases, not embracing this, we know of no authority for uniting as coplaintiffs several parties having separate and independent rights of action against the same defendant, or for a joint recovery thereon."

to important terms of the statutory provision. An action was brought upon an undertaking called a forthcoming bond, executed by the defendant and sureties in attachment proceedings. Certain creditors had commenced suit, and had attached the property of their common debtor. The latter gave the bond in question to the sheriff running to all these plaintiffs, the condition of which was that the property attached, or its equivalent in money, should be forthcoming to answer the judgments which might be obtained. Subsequently other creditors issued attachments against the same debtor, which were delivered to the same sheriff, and he returned on each that he had levied upon the same goods before mentioned. All these creditors united in an action upon the bond, and the objection was taken that there was a misjoinder of parties plaintiff. The court, after examining the clauses of the code relative to attachments, and showing that the bond inured to the benefit of all the creditors, disposed of the objection as to parties in the following manner: "The first question presented for our consideration is the right of joinder of the plaintiffs in the action. The provisions of the code are as follows [citing the sections]. In order to correctly determine this question, it is only necessary to ascertain what was the subject of the action, and how the parties stood related to it. The subject of the action is the attachment undertaking." The court proceeds to hold that all the plaintiffs had a beneficial interest in this undertaking, although not named as parties in it, and concludes: "It follows, therefore, that the subsequent attaching creditors had an interest in the subject of the action and in obtaining the relief demanded by the action upon the undertaking, and might properly be joined as plaintiffs."¹ It should be observed that the court here gave a very broad interpretation to the phrase "the subject of the action" and to the term "interest." The "subject of the action" was said to be the contract upon which the suit was brought, and not the mere individual rights arising from that contract, nor the breach of those rights by the defendant. The "interest" required is equally general, and the language of the clause is satisfied by a beneficial interest created by operation of law, even though the person in whom it resides is not named in the contract, and could not possibly have had any interest at the time the instrument was executed. Again, the rights of the

¹ Rutledge v. Corbin, 10 Ohio St. 478, 484, per Sutliff J.

plaintiffs were clearly several ; the undertaking of the defendants was for different amounts due to separate individuals, and payable upon the happening of different events having no legal connection and no common element. It was, in its legal effect, a collection of independent promises to pay distinct sums of money to separate persons contained in one written instrument.

§ 203. The Supreme Court of Indiana has stated the same general principles of interpretation in a clear manner, and with the evident desire to comply with the spirit of the new system which characterizes all the decisions of that able tribunal. An action was brought by three plaintiffs upon a peculiar contract, entered into between themselves and the two defendants, in which each of the five stipulated for indemnity against a certain contingent liability to be given by the four others, and in which the rights and liabilities were clearly several according to the common-law conception. The court say: "The code itself is not exactly definite as to who may be joined as plaintiffs. It provides, however, that judgment may be given for or against one or more of several plaintiffs, which was the practice in equity, though it was otherwise at law. It also provides that all persons having an interest in the subject of the action and in the relief demanded may be joined as plaintiffs. Indeed, the code seems to have re-enacted the rules which had prevailed in courts of equity as to who *must* join as plaintiffs, and may be joined as defendants. But as to those cases in which in equity plaintiffs might or might not have joined at their option, the code does not expressly speak, for the reason, probably, that the general rule in equity was not founded upon any uniform principle, and could not be expounded by any universal theorem as a test.¹ And it may have been thought safe, therefore, to leave each case to be decided by the courts upon authority and analogy. That it was intended the rules of pleading in courts of equity should govern the subject, is quite evident from those provisions of the code which prescribe the relief that may be granted, and to whom ; in this respect conforming entirely to the established practice of those courts,—a mode of administration quite impracticable in a great many cases, unless the parties might be as in chancery. The present inquiry is, then, in view of the considerations above stated, reduced to this: Could these plaintiffs

¹ Story Eq. Pl., § 589.

have formerly been joined in chancery?" The opinion proceeds to examine the provisions of the contract, and, holding that the rights as well as the liabilities of all the parties were entirely several, and would have been so regarded in equity, concludes as follows: "In the case before us there is in the plaintiffs no community of interest in any matter involved in the suit; no right common to all is claimed; every thing is separate, save only that the right asserted by each is founded in a contract which, for convenience, happens to be on the same sheet of paper. We have failed to find any warrant in the adjudged cases for a joinder of plaintiffs under such circumstances."¹ The equitable interpretation of the sections relating to the union of parties plaintiff is here fully admitted, and it is declared that the established rule of the equity courts is to be taken as the criterion by which to determine all questions as to the proper joinder of plaintiffs now arising, even in legal actions. The attempt to maintain this particular suit by the three coplaintiffs was condemned, not because their rights were several according to the legal notion, but because they were so unconnected that they could not have been enforced by a single action in equity. The same court reiterated this principle of interpretation in another well-considered case, and it may be regarded as the settled doctrine of that State. "The code requires all persons having an interest in the subject of the action, and in the relief demanded, except as otherwise provided, to be joined as plaintiffs. It also requires those who are united in interest to be joined as plaintiffs or defendants. And it then declares that, when the question is one of common or general interest to many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."² These provisions substantially re-enact the old equity rules on the subject of parties. All who are united in interest must join in the suit, unless they are so numerous as to render it impracticable to bring them all before the court; while those who have only a common or general interest in the controversy may one or more of them institute an action. This, however, must not be understood as allowing, in all cases, two or more persons having separate causes of action against the same defendant, though

¹ *Goodnight v. Goar*, 80 Ind. 418, 419, per Frazer J. See *Maple v. Beach*, 48 Ind. 51, 59.

² Code of Ind., §§ 17, 18, 19.

arising out of the same transaction, to unite and pursue their remedies in one action. Several plaintiffs, by one complaint, cannot demand several matters of relief which are plainly distinct and unconnected. But where one general right is claimed, where there is one common interest among all the plaintiffs, centring in the point in issue in the cause, the objection of improper parties cannot be maintained.¹

§ 204. Notwithstanding the common principle which lies at the bottom of the foregoing opinions, and which has undoubtedly been adopted by a great majority of the various State courts in their construction of these statutory provisions, there has not been an absolute unanimity of decision. By some individual judges, and even by some courts, the operation of the sections under consideration has been confined exclusively to equitable actions, while the ancient common-law rules as to parties have been declared controlling in all legal actions. A reference to two or three cases in which this ancient distinction has been still preserved, will be sufficient for my purpose. Two persons, A. and B., entered into a written contract with a third, C., for the performance of certain work and labor, at a stipulated price. The work having been completed, and C. refusing to pay the price agreed upon, A. brought an action upon the contract; demanding judgment for one-half of said sum, and making B., his co-contractor, a defendant, alleging that he had refused to be a party plaintiff, and had confederated with C. to hinder and delay the plaintiff from obtaining his demand. The Supreme Court of Missouri, in affirming a nonsuit which had been ordered at the trial, said: "If C. has violated his contract, he is liable to an action; but that action could only be brought in the joint names of A. and B., the contractors. That provision of the Practice Act which allows a party to be made a defendant when he will not join as a plaintiff, has nothing to do with this question. That was a rule of equity practice which was necessarily incorporated into a system *which abolished all distinction of actions*. In adopting it, it was not designed that it should have any oper-

¹ Tate v. Ohio & Miss. R. R., 10 Ind. 174; citing McKenzie v. L'Amoureux, 11 Barb. 516; Bouton v. City of Brooklyn, 15 Barb. 375; Murray v. Hay, 1 Barb. Ch. 59. The following cases, among others, assert the general doctrine that the pro-

visions of the code apply to legal and equitable actions alike. Cummings v. Morris, 25 N. Y. 625; Grinnell v. Schmidt, 2 Sandf. 706; Cole v. Reynolds, 18 N. Y.

ation but in cases where it was applicable under the former system of practice. It was never intended that it should affect the rights of parties arising out of written contracts. Nothing is better settled than the rule that, on an undertaking to two, both must join in an action on it, otherwise there is no cause of action. It is a part of the contract that both shall sue, otherwise no action shall be brought. If one will say that he had no right of action, and will not sue, why should he not have as much right as the other who says there is a cause of action?"¹ The same general doctrine was accepted as the basis of interpretation, and the same restriction of the statutory provisions to suits in equity was announced, by the Supreme Court of California in an early case arising upon similar facts. "The simple question presented for our consideration is, whether there was a non-joinder of parties plaintiff or not; it being contended that § 14 of the Practice Act has introduced a new rule, and that one of several parties may maintain an action on a joint contract, in his own name, by simply suggesting the impossibility of obtaining the consent of the others to join in the action. Upon examination of this section, we are satisfied that it was intended to apply to suits in equity, and not to actions at law."² I have placed in the foot-note a number of cases which contain expressions of opinion by individual judges, that the sections and clauses of the codes and practice acts regulating the choice and joinder of parties are confined in their scope and operation to equitable actions alone, and were not intended by the legis-

¹ *Rainey v. Smizer*, 28 Mo. 810, per Scott J. The opinion proceeds to state a number of imaginary difficulties in the way of such arrangement of parties as made by the plaintiff in this case. The decision, and the whole scope of the argument, are an excellent illustration of the judicial mode of repealing statutes. Conceding that the new system abolishes all distinction of actions, the learned judge, in the same breath, preserves these very distinctions entirely unaffected. If these distinctions were thus abolished, it would have been natural to conclude that the former equitable rule, incorporated into the code without a suggestion of limitation, was now to be applied to all actions alike upon a proper occasion. This natural conclusion is obviated, however, by a mere naked assumption as to the intent

of the legislature, — an assumption not warranted by a single clause of the statute, and utterly inconsistent with the entire history of the reform. Undoubtedly, the common-law rule mentioned by the court was well settled; but it was the very object, the avowed purpose, of the code to abolish this whole class of arbitrary legal dogmas, and to introduce in all judicial proceedings the freer and more just methods of equity. See, *per contra*, *Hill v. Marsh*, 46 Ind. 216.

² *Andrews v. Mokelumne Hill Co.*, 7 Cal. 830, 838. The same court has, in later cases, pursued a course of decision more in accordance with the spirit of the code, and has, as completely perhaps as any other tribunal, abandoned all attempt to preserve a distinction between actions at law and suits in equity.

lature to interfere with the former rules applicable to legal actions.¹

§ 205. The citations given in the foregoing paragraphs confirm the conclusions which were reached by a mere analysis of the language. That these provisions as to the parties plaintiff do enact the general doctrines which had prevailed in courts of equity, is admitted by both schools of interpretation; and that these equitable rules, thus embodied in a statutory form, do apply to all actions, and are not by any implied limitation restricted to equitable actions, is now, I think, declared by the courts in most of the States which have adopted the reformed procedure. Assuming these facts as premises, all the other propositions stated in my preliminary analysis follow as a necessary consequence. In this immediate connection it should be remarked that individual judges will give greater or less scope to the liberty granted by the legislative rule, according to their personal notions of expediency. There was a numerous class of cases, under the former system, in which courts of equity recognized an election on the part of claimants either to join in one proceeding or to sue separately. This power of choice, then confined, of course, to suits in equity, stills remains in similar instances, and may even be extended to certain controversies in which the cause of action is legal. Thus, where the right is strictly several, and would be regarded as such by the common law, equity might have allowed them an election to sue separately or jointly. This power of choice, contained in the equity doctrine, is introduced into the new procedure, and is of course not confined to suits equitable in their nature. We must, therefore, expect to find, within certain narrow bounds, some conflict of decision from judges who accept and heartily approve the general principles of interpretation which have been developed in the foregoing discussion.

§ 206. *Manner of raising the question as to the proper parties plaintiff.* Before proceeding to the discussion of particular cases and special rules, a preliminary question may be here properly answered: How can the objection that an action has not been brought by the proper plaintiff or plaintiffs be raised and regularly presented to the court for its decision? The codes of

¹ Voorhis v. Child's Executors, 17 Pemberton, 4 Sandf. 657; Van Horne v. N. Y. 354, per Selden J.; Habicht v. Everson, 13 Barb. 526.

procedure all agree in prescribing, among other grounds of demurrer to the complaint or petition, the following: "When it shall appear on the face of the complaint or petition; 2, that the plaintiff has not legal capacity to sue; or, 4, that there is a defect of parties plaintiff or defendant; or, 6, that the complaint or petition does not state facts sufficient to constitute a cause of action;"¹ and also that, "when any of the matters enumerated in section [the foregoing] do not appear on the face of the complaint or petition, the objection may be taken by answer;"² and, finally, "if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint or petition does not state facts sufficient to constitute a cause of action."³ The construction to be placed upon these clauses, and the resulting rules prescribing the methods by which an objection as to proper parties must be interposed, in order to present a question for judicial decision, have been settled in the various States with almost complete uniformity. *In regard to defect of parties plaintiff*, the interpretation is now established, that "defect of parties," given as one ground of demurrer, means too *few*, and not too *many*. A demurrer alleging this particular objection can only be interposed, therefore, in case of a *non*-joinder of necessary plaintiffs or defendants, and never in case of a *mis*-joinder. The word "defect" is taken in its literal sense of "deficiency," and not in a broader sense as meaning *any* error in the selection of parties. Upon this point the courts are nearly unanimous.⁴ It has been

¹ New York, § 144; Minnesota, § 80; § 2650; Mo., art. 5, § 10; Ind. § 54; Wis. ch. 125, § 9; Ohio, § 89; Oregon, § 70; Kansas, § 89; Nebraska, § 94; Iowa, § 2648; Missouri, art. 5, § 6; Indiana, § 50; Wisconsin, ch. 125, § 5; Ohio, § 87; Fla. § 99; Cal. § 484; Dacotah, § 101; N. C. § 99; S. C. § 171.

² New York, § 147; Minnesota, § 82; Kansas, § 91; Nebraska, § 96; Iowa, § 2650; Missouri, art. 5, § 10; Indiana, § 54; Wisconsin, ch. 125, § 8; Ohio, § 89; Oregon, § 69; Florida, § 98; Cal. § 488; Dacotah, § 100; N. C. § 98; S. C. § 170.

³ New York, § 148; Minnesota, § 82a; Kansas, § 91; Nebraska, § 96; Iowa, § 2650; Mo., art. 5, § 10; Ind. § 54; Wis. ch. 125, § 9; Ohio, § 89; Oregon, § 70; Fla. § 99; Cal. § 484; Dacotah, § 101; N. C. § 99; S. C. § 171.

⁴ Palmer v. Davis, 28 N. Y. 242; Case v. Carroll, 35 N. Y. 385; Richtmyer v. Richtmyer, 50 Barb. 55; Powers v. Bumcratz, 12 O. St. 273; Berkshire v. Shultz, 25 Ind. 523; Bennett v. Preston, 17 Ind. 291; Mornan v. Carroll, 35 Iowa, 23; Hill v. Marsh, 46 Ind. 218. As the same is true of defendants,—the section including both parties in a single formula,—the decisions in reference to them are in point. See Peabody v. Washington, &c. Ins. Co., 20 Barb. 339; Voorhis v. Baxter, 18 Barb. 592; s. c. 17 N. Y. 854; Bank of Havana v. Magee, 20 N. Y. 855.

held, however, in Wisconsin that this is the proper form of demurrer where the objection is to a misjoinder.¹

§ 207. When a defect of parties plaintiff—that is, a non-joinder—appears on the face of the complaint or petition, the defendant *must* raise the question by demurrer, and not by answer. If he neglects to interpose a demurrer upon this specific ground, he waives the objection entirely, even though he sets up the defence in his answer. The reason given for this somewhat technical rule is the following: The mere defence of a defect of parties, not going to the real merits of the controversy, and not denying the cause of action existing in some persons, is not favored by the courts; it is regarded as a “dilatatory defence,” because it does nothing more than postpone the decision of the substantial issues; and, although the defendant is permitted to avail himself of it, he must follow exactly the modes prescribed by the rules of practice, or by the statute for its interposition.² If the defect does not appear upon the face of the complaint or petition, the defendant must set up the defence specially in his answer, or, failing this, he waives the objection.³ To sum up: if a defect of parties plaintiff appears in the pleading, the mode of raising the defence is by demurrer alone; if it does not appear in the pleading, by answer alone; and, unless the defendant complies with these requirements as to method, he waives all objection. It has been expressly decided in Ohio, and this is plainly the correct rule, that a demurrer for want of sufficient facts does not raise the question of a defect—non-joinder—of plaintiffs or defendants.⁴

§ 208. *A want of legal capacity to sue.* A demurrer or defence for this cause must relate exclusively to some legal disability of

¹ Read v. Sang, 21 Wisc. 678. The demurrer was held proper upon the authority of an early New York decision, — Dunderdale v. Grymes, 16 How. Pr. 195, which has since been many times overruled in that State.

² Zabriskie v. Smith, 18 N. Y. 322; De Puy v. Strong, 87 N. Y. 372; 8 Keyes, 603; Patchin v. Peck, 88 N. Y. 89; Fisher v. Hall, 41 N. Y. 416; Wells v. Cone, 55 Barb. 585; Hees v. Nellis, 1 N. Y. Sup. Ct. 118; Alexander v. Gaar, 15 Ind. 89; Justice v. Phillips, 3 Bush (Ky.), 200; Andrews v. Mokelumne Hill Co., 7 Cal. 330; Tennant v. Pfister, 45 Cal. 270;

Dailey v. Houston, 58 Mo. 361, 366; McRoberts v. So. Minn. R. R., 18 Minn. 108, 110. As the same rule applies in case of defect in parties defendant, see Dillaye v. Parks, 31 Barb. 182; Wright v. Storrs, 82 N. Y. 691; s. c. 6 Bosw. 600; Abbe v. Clarke, 31 Barb. 238.

³ Ibid. Also Merritt v. Walsh, 82 N. Y. 685; Donnell v. Walsh, 83 N. Y. 43; s. c. 6 Bosw. 621; Gock v. Keneda, 29 Barb. 120; Umsted v. Buskirk, 17 Ohio St. 118; Dickinson v. Vanderpoel, 5 N. Y. Sup. Ct. 168.

⁴ Umsted v. Buskirk, 17 Ohio St. 118.

the plaintiff, — such as infancy, coverture, idiocy, and the like, — and not to the absence of facts sufficient to constitute a cause of action. The facts constituting a cause of action may be sufficiently averred, and yet the plaintiff may not have a legal capacity to sue. The objection that the plaintiff has not legal capacity cannot, therefore, be raised and relied upon under a demurrer for want of sufficient facts, nor the objection of a want of facts under a demurrer alleging an absence of legal capacity.¹

§ 209. *Misjoinder of Plaintiffs.* A misjoinder of parties plaintiff is not made a specific ground of demurrer, or mentioned as a defence, except in one or two of the codes. At the common law two or more persons could not be joined as plaintiffs in an action upon contract, unless they possessed a joint right; and, if on the trial they failed to establish such right as alleged residing in all, a nonsuit was inevitable. If two or more persons were united as plaintiffs in a legal action based upon their right of property in lands or chattels, they must necessarily have been either joint owners or owners in common, and a failure to prove the joint right of action was followed by the same consequence, — a defeat of all the plaintiffs. The arbitrary theory of this ancient rule has already been explained, and need not be repeated. In equity, no such doctrine prevailed; because, when two or more persons were made plaintiffs in the same action, it by no means followed that they held and alleged a joint right residing in themselves. When, therefore, there was an improper or unnecessary union of co-plaintiffs in an equity action, the suit did not necessarily fail as to all; the bill might be dismissed at the hearing as to certain of the plaintiffs, and a decree rendered for the others; or some might be struck off, upon motion, at any stage of the proceedings, and the cause go on in the name of the residue.

§ 210. Has any change in these conceptions, and in the practical rules derived from them, been wrought by the codes of procedure? If the old distinction between joint legal rights and

¹ De Bolt v. Carter, 81 Ind. 355; How. Pr. 149; Hobart v. Frost, 5 Duer, 672. In New York, a corporation is not required to aver the acts creating its corporate character; and, in an action by a bank where the complaint omitted any such allegation, a demurrer on the ground of a want of legal capacity was overruled. Phoenix Bank v. Donnell, 40 N. Y. 410, 41 Barb. 571.

several legal rights is maintained ; if the ancient notion of the common law, that two or more parties plaintiff in a legal action, brought upon a contract or upon the ownership of land or chattels, must hold a joint cause of action, is still preserved, with all of its technical incidents ; if it be considered that the reform legislation has confined its equitable doctrine as to parties to equitable actions alone, while it has left the doctrines regulating legal actions untouched, — then no change has been wrought in the practical rules which determine the effect of a misjoinder of plaintiffs, as stated in the foregoing paragraph. Under this assumption, a misjoinder of plaintiffs in a legal action, brought upon a contract or upon property in lands or chattels, must now, as formerly, entail the consequence of a complete failure ; while now, as formerly, a misjoinder of plaintiffs in an equity suit does not entail such a consequence ; a judgment can be recovered by a portion of the plaintiffs, and the action be dismissed as to the residue. If, on the other hand, the system is to be accepted and acted upon in the spirit which designed it, — if its requirements as to parties, which, as is universally conceded, enact the established doctrines of the equity courts, extend the one principle to all actions, legal as well as equitable, — then there is a single rule governing all actions, and, so far as the dogmas of the common law are inconsistent therewith, they are necessarily abrogated, and form no part of the reformed American procedure. The most conspicuous and characteristic of these dogmas are the notions as to joint rights, and as to the impossibility of severing in the judgment when such rights have been averred as the causes of action ; and these notions must be abandoned, if full force and effect are to be given to the language used by the legislature. The whole discussion is thus reduced to a single question : Are these provisions of the code to be accepted in their entirety, with all their legitimate and necessary consequences, or are they to be limited and restricted by some exception grafted upon them by the courts, and are their consequences to be abridged and their operation to be confined to those actions which, under the former system, would have been called equitable ? I have already, in the former portion of this section, stated, as the guiding principle of interpretation adopted by most of the courts, the doctrine that the equitable rules of the codes were to be applied in all actions, whatever be their nature. This is certainly the inference to be

drawn from the judicial decisions *when a general theory of interpretation was the subject of discussion*; and one theory, when accepted, ought, beyond a doubt, to be carried out in all the minor details, in the work of creating all the practical rules for administering justice, if any consistent and symmetrical result is desired. But, unfortunately, in comparing the decided cases, and in endeavoring to deduce from them a body of practical rules, we shall find so much inconsistency and vacillation in the judgments of even the same tribunals, that we are sometimes forced to doubt whether *any* general principle of construction was ever intended to be adopted by the courts, whether they ever accepted any theory of interpretation, and proceeded to work from it as a foundation in constructing a system of procedure. In regard to the particular matter now under consideration, if we collect and compare the decisions which have been made in the different States, it will be difficult, if not impossible, to say, *upon their authority*, that any definite rule has been established determining the effect of a misjoinder of plaintiffs.

§ 211. It is certainly settled beyond a doubt that, in all equitable actions, and in all actions where, upon equitable principles, a coplaintiff may sometimes be added, not because he is jointly interested with the other, but because his presence as a party is considered necessary to a complete determination of the issues,—as where a husband is sometimes added in an action brought by a wife touching her separate property,—the equitable rule applies in its full force, and a misjoinder of plaintiffs is not a defence to the suit; it is neither a ground of demurrer, nor can it be set up in the answer as a bar to the relief demanded in the complaint or petition. The name of the unnecessary plaintiff may be struck out by the court, upon motion; or, if the cause proceeds to trial, a judgment may be rendered in favor of the plaintiff entitled thereto, and the action dismissed as against the others.¹ The

¹ *Ackley v. Tarbox*, 81 N. Y. 564; *Allen v. Buffalo*, 88 N. Y. 280. *Ackley v. Tarbox* was an action by husband and wife to recover damages for the conversion of a chattel belonging to the wife. The pleadings showed that the suit was really in favor of the wife, and that the husband was added under a notion that he was a necessary party. The judgment for the plaintiffs was reversed by the General Term of the Supreme Court, because of the misjoinder. The Court of Appeals held that he was an improper party, but that the judgment should not have been reversed on that account. "As soon as the objection was taken, it was the duty of the court to have stricken his name from the proceedings in the action. It can now be done, and the judgment stand as it ought,—a judgment for the

changes made by the codes themselves, and also by special statutes relating to the property rights of married women, have certainly extended this rule to many cases not strictly equitable, even to cases which could not have been maintained at all while the common law was in its integrity.

§ 212. There is another class of decisions, made in actions of a similar nature to those last mentioned, — that is, actions strictly equitable, and those in which a plaintiff is added in pursuance of a supposed positive rule of practice, although no joint legal right is alleged, — in which it has been held that, if the misjoinder of a plaintiff appears upon the face of the complaint or petition, the defendant may demur as against the party thus improperly joined, on the ground that the pleading does not state facts sufficient to constitute a cause of action in his favor; or, if no demurrer is interposed, the same objection may be raised at the trial, and the action dismissed as to him. If the misjoinder does not appear upon the face of the pleading, the defence must be set up in the answer.¹ The principle of this class of decisions is the same as that involved in the cases described in the preceding paragraph. The actions in which this method of raising the objection of a misjoinder is permitted, may be equitable or may be legal; but, if the latter, they are not based upon a joint legal right alleged to be held by all the plaintiffs. In all of them the right of action is assumed to be possessed by one or more of the plaintiffs, who are the real parties in interest, and the other parties are added through some supposed requirement of form or of policy.

§ 213. We are finally brought to the case of an action strictly legal in its nature, brought by two or more plaintiffs in whose favor a joint right is averred as the ground of recovery. The courts of some States have distinctly asserted and applied the

wife." Although this action was nominally joint, because it demanded judgment for the plaintiffs, yet the right alleged was plainly several, and the case is not an authority on the question of joint legal rights averred in a complaint.

¹ *Palmer v. Davis*, 28 N. Y. 242. Palmer and wife sued on an award made in her favor. The Court of Appeals held that the husband was not a proper plaintiff; that, as this appeared on the face of the complaint, the defendant might have demurred generally as to him; and that

the same objection could be raised on the trial, and the complaint dismissed as to him, but not as to both. No joint cause of action was here alleged, although, *nominally*, the action was joint. See also *Willard v. Reas*, 26 Wisc. 540, 544, which holds that, in an action by two or more plaintiffs, a general demurrer against *all* these plaintiffs, on the ground of a want of sufficient facts, is bad if a good cause of action is alleged in favor of one of them.

ancient common-law rule under these circumstances, notwithstanding the provisions of the codes, and notwithstanding even the liberal scheme of interpretation which had, as a *general theory*, been adopted by the same tribunals. When, in such an action, a joint right is averred as arising from contract or from the ownership of land or chattels, while in fact no joint right in all exists, but only a several right held by one or a joint one held by some, this error, according to the construction now stated, goes to the entire proceeding, and defeats the suit as against all the plaintiffs. If the error appears upon the face of the complaint or petition, the objection may be raised by a general demurrer interposed against all the plaintiffs, on the ground that facts sufficient to constitute a cause of action are not stated in the pleading; and, in the absence of a demurrer, the same objection may be taken at the trial by a motion for a nonsuit or for a dismissal of the action. Finally, if the error is not apparent on the face of the pleading, the defence may be set up in the answer, and is, perhaps, admissible under the general denial. This is plainly the original common-law doctrine, unaffected by the reform legislation, and it proceeds upon the assumption that the cause of action is a joint one, that this attribute of *jointness* is as essential to the maintenance of the alleged right as any other material fact, and that the inability to establish the particular averment is not a mere variance, but is a complete failure of proof.¹ As

¹ *Bartges v. O'Neil*, 18 Ohio St. 72; *Masters v. Freeman*, 17 Ohio St. 323; *De Bolt v. Carter*, 81 Ind. 355; *Goodnight v. Goar*, 30 Ind. 418; *Berkshire v. Schultz*, 25 Ind. 523; *Lippperd v. Edwards*, 39 Ind. 165; *Estabrook v. Messersmith*, 18 Wisc. 545; *Frans v. Young*, 24 Iowa, 375; *Giraud v. Beach*, 8 E. D. Smith, 337. Certain of these cases *inferentially* support the propositions contained in the text, by holding that a misjoinder of plaintiffs in such actions may be taken advantage of by a general demurrer, upon the ground that sufficient facts are not alleged; the others, however, sustain these propositions to their full extent. As the subject is one of great practical importance, I shall quote from these decisions at some length. *Bartges v. O'Neil*, 18 Ohio St. 72, was an action by a husband and wife to recover damages for deceit in the sale of lands purchased

from the defendant. The purchase price was paid by the husband, but the conveyance was made to the wife. The petition alleged fraudulent representations, by which the plaintiffs were induced to engage in the transaction, and a judgment for the joint damages alleged to have been sustained by both was demanded. A demurrer for want of sufficient facts having been overruled, the cause went to trial. No representations were shown to have been made to the wife, nor did she participate in the negotiation and purchase, nor pay any of the price; the conveyance was simply made to her as the result of the bargain at the husband's request. It will be seen that the cause of action, *as alleged*, was strictly a joint one. The plaintiffs did not sue in their marital capacity; the case was the same as though any other person had taken the part in

an illustration: if the complaint should allege that the plaintiffs A. and B. were partners, and as such had sold and delivered to

the transaction taken by the wife, and had been made a coplaintiff. The Supreme Court of Ohio held that the petition disclosed no cause of action belonging to the plaintiffs jointly, as was averred, and that this defect could be taken advantage of by a general demurrer for a want of sufficient facts; and that the action should have been dismissed on the trial for the same reason. Compare this decision with that made by the New York Court of Appeals in *Simar v. Canaday*, 58 N. Y. 298, which, to a certain extent, presented the same peculiar features. The Ohio court reaffirmed the doctrine in the subsequent case of *Masters v. Freeman*, 17 Ohio St. 322, which was a legal action brought by two plaintiffs, alleging an indebtedness to them jointly. An answer, setting up facts showing that there was no joint right as claimed, having been struck out, and the plaintiffs having recovered a judgment, the Supreme Court reversed this judgment, holding that the defence contained in the answer was a complete bar to the recovery, and also that if the error appeared upon the face of the petition, a demurrer for want of sufficient facts was a proper mode of presenting the objection, but that it was not waived by an omission to demur. *Estabrook v. Messersmith*, 18 Wisc. 545, was an action by two partners, alleging their partnership, their joint ownership of certain goods, and a wrongful conversion thereof by the defendants. It appeared on the trial that one of the plaintiffs had been guilty of a fraud upon his creditors in respect of the property in question, which, as the court held, precluded him from recovery; and it was thereupon claimed by the defendants that, although the other plaintiff was innocent of the fraud, there could be no recovery in any form,—not by the plaintiffs jointly, because one of them was unable to maintain the action; and not by the innocent partner, because the right averred in the complaint was a joint one. The plaintiffs were permitted, however, to recover the value of the innocent partner's interest. This judgment was reversed by the Supreme Court, and the grounds of the de-

cision were thus stated by Dixon C. J. (p. 549): "The plaintiffs were partners, and sued for the alleged wrongful conversion of their partnership property; and such is the nature of their legal right—they are so indissolubly blended—that they must not only join in an action at law, but a right of action must be established in both, or no recovery can be had. It is a general principle, applicable to suits of this nature, that all must be entitled to judgment, or none; and in cases where either party is precluded on the ground of fraud, the fraud binds not only the guilty partner, but the innocent partner in that suit. . . . It would seem that, if the defrauded party [meaning the innocent partner] has any remedy, it is only by a suit in equity, in which the objection of joining his guilty copartner as a party plaintiff is easily obviated." I must remark, in passing, that the last observation is certainly a strange one, in the face of the statutory provision contained in the Wisconsin code, which purports to abolish all distinctions between legal and equitable actions. That a plaintiff should be turned out of court in one action *called legal*, and should be told that he must bring another action *called equitable*, for exactly the same demand, and upon exactly the same allegations of fact, and that, in the latter suit, the particular and technical ground of his defeat in the former one could not be objected to his recovery, seems, to say the least, to be a recognition of the "distinction" which the law-making power had so expressly abrogated. The Supreme Court of Indiana has approved the same doctrine in substance, although in a form somewhat modified. In *Berkshire v. Shultz*, 25 Ind. 523, which was an equitable action, the court stated the doctrine in a general form, that when plaintiffs unite in bringing an action, and the complaint does not show a joint cause of action, a demurrer will lie on the ground that sufficient facts are not stated to constitute a cause of action. *Goodnight v. Goar*, 80 Ind. 418, was a strictly legal action, brought by three plaintiffs, the complaint disclosing a separate cause of action in favor of each, but

the defendant certain goods, for a stipulated price, and should demand a judgment therefor, and on the trial it should appear that A. and B. were not partners as averred, and did not jointly sell and deliver the chattels to the defendant, but that in fact the same were sold and delivered by A. alone, B. having no interest in or connection with the transaction, in pursuance of the rule adopted in these decisions no judgment could be rendered for A. separately; the action would entirely fail as respects both the plaintiffs. It thus appears that, in at least three States, the courts have, in the most explicit manner, and in well-considered opinions, reaffirmed the ancient common-law doctrine in respect to legal actions brought by two or more plaintiffs jointly; and have held that the joint right must be proved as alleged, or the action must fail as to all the plaintiffs. In other States, it is merely said that a misjoinder is ground for a demurrer interposed to all the plaintiffs, for the cause that the complaint or petition does not state facts sufficient to constitute a cause of action.

§ 214. The question has been presented to the New York Court of Appeals, but has not been passed upon in such an explicit manner as necessarily to establish the rule for that State. In an action brought by two plaintiffs, G. and C., to recover damages for an alleged fraud, the action being in form joint, and the demand of judgment being for damages due to the plaintiffs jointly, the complaint was dismissed at the trial, because it appeared that the right of action was held by one of the plaintiffs alone. In respect to this ruling, the Commission of Appeal said: "Probably the court had the *power* in this action, if the claim had been made, to have awarded to C. his damages, giving judgment against the other plaintiff. But the court was not bound to do this, and committed no error in defeating the plain-

no joint right in favor of any. Upon a general demurrer for want of sufficient facts, the doctrine of the last case was repeated, and the action was dismissed as to all the plaintiffs, although it was conceded that each had a valid claim, which he could have enforced in a separate suit. In *De Bolt v. Carter*, 81 Ind. 356, a relaxation of the doctrine was intimated. After repeating the rule laid down in the two preceding decisions, the court said: "The defect can only be cured by *striking out the name of the plaintiff improperly*

joined, or by so amending the complaint as to show a right of action in all the parties." But, in *Lippard v. Edwards*, 39 Ind. 165, 170, the ancient rule was stated in all its severity. "It seems to be the law now, as it was before the code of civil practice, that, when two or more join in an action, the complaint must show a right of action in both or all of them; or it must be held insufficient, on a demurrer assigning for cause that it does not state facts sufficient to constitute a cause of action."

tiffs, because they did not establish a cause of action in which they were *both* interested.”¹ This conclusion is certainly very unsatisfactory. It can hardly be possible that it is a matter of discretion with the court, at the trial, whether it will permit a severance in the judgment or will dismiss the action entirely. The rights of litigant parties cannot depend upon so varying a criterion as the opinion or whim of an individual judge. In a subsequent case, where the action was brought by a husband and wife to recover damages for a fraud alleged to have been done to them jointly, and in which a joint right of action was distinctly averred, the same court announced the rule in the following manner, but, as it was entirely unnecessary to the decision of the case, the expression of opinion cannot be regarded as any thing more than a dictum: “The defendant moved to dismiss the complaint upon several grounds, and, 1st, that the plaintiffs could not maintain a joint action, and that there was thereby a misjoinder of parties plaintiff. This point is not rested upon the marital relation of the plaintiffs, and the existence of that relation may, in considering it, be put out of view. It is an objection which may be taken on the trial.”² But it is not an objection which affords good grounds for a motion to dismiss the complaint of both plaintiffs, if either of them has shown that he or she has a good cause of action. In such case the motion must be for a dismissal of the complaint of the plaintiff in whom no right of action appears.³ Whether either of the plaintiffs had shown a good cause of action will be considered under the next two heads.”⁴

¹ *Calkins v. Smith*, 48 N. Y. 614, 619, per Earl J.

² Citing code, § 144 (6), § 148; *Palmer v. Davis*, 28 N. Y. 242.

³ *Simar v. Canaday*, 53 N. Y. 298, 301, per Folger J. The learned judge is unfortunate in his citation of *Palmer v. Davis* as an authority for his position. That case was an action by a wife to recover damages for the conversion of chattels belonging to her exclusively; and the husband was joined as plaintiff because it was supposed he was a necessary party by reason of the marital relation. The complaint showed that the interest was exclusively in the wife, and the decision proceeded upon a ground, as was shown in a preceding paragraph (§ 212), which has no relation whatever with a purely legal

action like the present, brought upon an alleged joint right, and demanding a joint judgment. Still the opinion of Folger J. would be conclusive of the question, if it was not wholly unnecessary to the decision. He goes on, and, in a subsequent portion of his elaborate judgment, holds that *both the plaintiffs actually held and possessed the joint right of action, as alleged*, and were entitled to the joint judgment demanded. This being the actual state of the case, all speculations as to what could or could not be done if they had *not* possessed such a joint cause of action, are, of course, entirely *obiter*. This expression of opinion doubtless indicates the views of the judges upon an important question; but it is not an authority as a *decided point*. *S. P. Green v. Green*, 69 N. C. 294, 298.

§ 215. Although not entitled to the weight of authority as a *decision*, the doctrine last-quoted from the opinion of the New York Court of Appeals is in complete accordance with the true spirit and evident intent of the reform legislation. The conclusions reached by the courts of Ohio, Wisconsin, and Indiana, in the cases heretofore cited, plainly result from a failure to grasp the central principle of interpretation which should be applied in construing the codes of procedure, and to push it to its legitimate consequences. That principle, which had been fully recognized by the same tribunals under other circumstances, is the purely equitable nature of the statutory provisions regulating the subject of parties, and the application of the equitable theory to the civil action in all its phases, and under all its uses, without exception or limitation. This is now conceded, almost universally, to be the true interpretation of the clauses of the codes under consideration, whenever the mode of interpretation is to be stated in a general and comprehensive manner. The confusion and conflict of decision shown in the preceding paragraphs arise from the fact that courts, in determining the special rules applicable to particular classes of cases, have been unwilling to carry out the principle which they have accepted in its most general form, and to adopt the results which necessarily flow from it; they have shrunk from the changes in the old and familiar methods which such a course would produce. It is very plain, however, that, if we are ever to have a uniform, consistent, simple, and symmetrical system of procedure as the outcome of the reform legislation, the courts must be willing to follow the general principles of interpretation to their legitimate conclusions. A system in which the equitable doctrine as to parties and judgments is permitted to work its effect upon legal actions to a partial extent, while the ancient legal doctrine is applied in other instances, would be more objectionable even than the former complete division between equitable and legal proceedings. As the codes do not indicate any line where the equitable doctrine is to stop and the legal to commence, in determining the practical rules, the position of this line must depend upon the views of individual judges and courts, and thus an element of uncertainty and confusion is introduced into the procedure, which can never be removed; there being no *principle* by which to settle the respective limits of the two theories or doctrines as to parties, no

fixed system of practical rules would ever be established. If, on the other hand, the equitable doctrine should be not only stated as the correct general theory of interpretation, but should be honestly followed out in its application to all cases, the same practical rules would be deduced alike for legal and for equitable actions, and the resulting system would be definite, certain, and consistent,—the system beyond a doubt contemplated by the legislatures when they enacted the codes in the several States. If this were done, the ancient rules of the common law respecting the nature of joint rights when set up as the basis of recovery, and the effect of alleging such a right in favor of two or more plaintiffs, would disappear, and a severance in the judgment would be as much a matter of course in legal actions as in equitable suits.

§ 216. There is still another case in respect of which there seems to be a unanimity of decision. When an action is brought by two or more plaintiffs, and the averments of the complaint or petition show that one or more of them have been improperly joined as coplaintiffs with the rest, the defendant may interpose a demurrer as to such plaintiff or plaintiffs, not because of a defect of parties, nor because of a misjoinder, but because the complaint or petition does not state facts sufficient to constitute a cause of action in respect to these plaintiffs. The distinction between this case and the one last considered is evident. In the latter, the demurrer is to all the plaintiffs, and the objection extends to the entire action upon the alleged ground that no joint claim or cause of action is shown to exist in all the plaintiffs. In the present case, it is conceded that a cause of action is shown in favor of one or more of the plaintiffs, and the objection goes only to the others in whose favor no cause of action appears. This mode of objecting to a misjoinder of plaintiffs may be used in legal as well as in equitable actions. Of course, if the objection does not appear upon the face of the pleading, but exists as a matter of fact, it may and should be set up as a defence in the answer.¹

¹ The rule as stated in the text is either expressly approved, or is impliedly acknowledged, in several of the cases cited under the preceding paragraph. See also *Willard v. Reas*, 26 Wisc. 540, 544; *Peo-*

ple v. Crooks, 58 N. Y. 648. In Missouri and California the codes expressly state, as one ground of demurrer, the misjoinder of the parties, plaintiff or defendant.

Rules as to Plaintiffs in Particular Classes of Cases.

§ 217. I now pass from this examination of the doctrine in its general scope to its application in the various classes of cases which can arise in the administration of justice. The further discussion will be pursued in the following order: *First*, Parties plaintiff in legal actions; *Second*, Actions by or between husband and wife; *Third*, Parties plaintiff in equitable actions. The first of these divisions will be separated into 1. Actions by owners in common and by joint owners of land; 2. Actions by joint owners of chattels; 3. Actions by persons having a joint right arising from contract; 4. Actions by persons having several rights arising from contract; 5. Actions by persons having a joint right arising from tort; 6. Actions by persons having several rights arising from torts. The second and third of the general divisions do not admit of a similar subdivision.

§ 218. *First: The Union or Separation of Plaintiffs in so-called Legal Actions.* I. *Actions by owners in common, or by joint owners of land.* The change in the common law produced by statute throughout the United States has practically abolished joint ownership in land, except in the case of those holding *alieni juris*, as trustees. The statutory rule is, I believe, quite universal among the States, that when two or more persons succeed by inheritance to the same land, their ownership is common and not joint, and when land is conveyed to several persons in their own right, without any express direction to the contrary, their ownership also is common.¹ The exceptions to this rule are trustees who are generally omitted from the operations of the statutes, so that a grant or a devise to several as trustees creates a joint ownership; and in certain States, as in New York, the peculiar modification of joint estates, created by a conveyance to a husband and wife, is held to be unaffected by the statutes, and to exist as at the common law. On the other hand, the legislation of some States has abolished joint ownership in an absolute manner, so that it cannot be created even by the act of the parties. As a conclusion, it is enough to say that the common-law joint tenancy of land by persons holding *sui juris* does not practically exist in this country.² At the common law all the joint owners were

¹ Wash. on Real Prop., vol. 1, p. 409 (note).

² Wash. on Real Prop., vol. 1, p. 409 (note).

required to unite in any action, whether real or personal, based upon their proprietary right. With owners in common, the rule was not so uniform. In personal actions for injuries done to the land, it was proper for all the owners to unite; in actions to recover possession, however, each sued for his individual interest, although this particular doctrine was doubtless modified in many States, as it was in New York. Finally, in actions for rent, if the letting was joint, or if the reservation was of an entire rent to all, all would unite as plaintiffs; but if the rent was reserved to them separately in distinct parts, each must sue for his own share.¹ It should be remembered that, in the action of ejectment at the common law, the plaintiff was the fictitious person called John Doe, and the real claimant was his lessor. It was only in the United States, where the fictions of the action had generally been abolished by statute, that it was possible for joint owners or owners in common to appear as the actual *plaintiffs* in ejectment. I now pass to cases decided since the enactment of the codes in the several States.

§ 219. Where the rent is entire, owners in common of the demised land may unite in an action to recover it from the lessee; and upon the same principle they may join in an action to recover the rent from a person to whom it had been paid for their use; for example, devisees in fee in remainder, after a life estate, may join in a suit against the executor of the deceased life-tenant to recover the rent which he had collected from the lessee subsequent to the death.² A joinder of all does not, however, seem to be absolutely necessary. It seems that each may sue for his own share of the rent, even though it accrue as an entire sum to all the owners in common.³ The only possible

¹ See *supra*, §§ 187, 189, 190, 1 Ch. Pl. (Springfield ed., 1840), pp. 18, 65.

² *Marshall v. Moseley*, 21 N. Y. 280, 287, per Comstock J.: "The remaining question is, whether the plaintiffs can maintain this action jointly. We are of the opinion that they can. If the rent had not been collected, the plaintiffs, as tenants in common of the reversion, might have joined in an action to recover it. This rule appears to be extremely well settled, the only doubt suggested by the authorities being whether they could sever in their suits if they had elected to do so.

These authorities will also show that the plaintiffs, having the same common interest in the money which the defendant received as rent that belonged to them, can unite in their action to recover it out of his hands, and this, we think, is also clear upon principle." See *Cruger v. McLaury*, 41 N. Y. 219, which settles the doubt stated by Comstock J., and holds that one of the owners in common may sue for his share of an entire rent. See *infra*, § 220, n. (2).

³ *Jones v. Felch*, 3 Bosw. 63; *Porter v. Bleiler*, 17 Barb. 149. In the first of

alternative, however, is a suit by all or a suit by each for his own portion separately; an action cannot be maintained by a portion more than one and less than all.¹ When the lessor of land dies intestate, the term being unexpired, his administrator is the only proper party to sue for the unpaid rent which accrued prior to the death, while the heirs, either jointly or separately, must sue for that accruing subsequently thereto.² In actions brought to recover damages for torts done to the land, such as trespasses, nuisances, and the like, the common-law rule remains unchanged, and all the owners in common must unite as plaintiffs;³ even when they hold under different titles, they must still join, as, for example, the heirs-at-law and devisees of the same land, in an action for injuries done to the inheritance,⁴ or the owners in common of a mill, who derive their rights under different conveyances, in a suit for the diversion of water from their mill.⁵ The owners in common must also join in an action to recover damages for fraud practised in the sale of the land to them; a separate suit cannot be maintained.⁶ Administrators or

these cases land had been leased, and the lessor died, leaving six children, his only heirs. One of them brings this action for his portion of the rent accruing after the death of his ancestor, the complaint setting forth all these facts. On a demurrer by the defendant, the New York Superior Court held the common-law rule to be that, under such circumstances, each owner in common might sue for his portion, or all might join in an action for the whole, and that this rule had not been changed by the code. *Porter v. Bleiler* simply holds that owners in common may join.

¹ *King v. Anderson*, 20 Ind. 885. Lands had been leased by an owner who died intestate, leaving heirs his children and certain grandchildren. This action was brought by a portion of the heirs to recover two years' rent, for the first year accruing before the death, and for the second year accruing after the death. The court held that the administrator was the only proper person to sue for the rent which had accrued prior to the death, and the heirs for that accruing after the death. A portion of the heirs, however, could not sue; all should have been joined; and as the shares of the children and of the grandchildren were unequal,

the complaint should have shown which were children and which grandchildren, and their respective portions of the whole rent. The case does not hold that one heir could not maintain the action.

² *King v. Anderson*, 20 Ind. 885; *Crawford v. Gunn*, 85 Iowa, 548.

³ *De Puy v. Strong*, 37 N. Y. 872; 3 Keyes, 608; *Hill v. Gibbs*, 5 Hill, 56; *Parke v. Kilham*, 8 Cal. 77 (diversion of water).

⁴ *Van Deusen v. Young*, 29 Barb. 9. The plaintiffs were some heirs, and the others devisees of the deceased owner of a farm, and brought an action to recover damages for an injury to the inheritance. Hogeboom J. said (p. 19): "They were all owners, and jointly interested. The injury is to their common property, and the damages to all. They derive title from a common ancestor, and, all together, represent the estate which he held in his lifetime, and for an injury to which they may be regarded as his proper representatives. This is one of the cases where tenants in common may and ought to join."

⁵ *Samuels v. Blanchard*, 25 Wisc. 329.

⁶ *Lawrence v. Montgomery*, 37 Cal. 188, 188, per Crockett J. See *Foster v. Elliott*, 83 Iowa, 216, 224.

executors cannot sue for trespasses or other injuries done to the land after the death of the owner whom they represent; the heirs or the devisees, as the case may be, are the only proper plaintiffs.¹

§ 220. Owners in common need not unite in an action to recover possession; each may bring a separate suit for his undivided share.² This is a very familiar rule, and such actions are constantly brought by widows to recover their dower before it has been set out to them or admeasured, and by individual heirs. Of course all the owners *may* join, and *must* join if the design is to recover possession of the entire tract over which the common ownership extends, as a separate parcel of land; when *one* sues, he can only demand and obtain a judgment for his own undivided portion of the common premises. The election between modes of instituting the action goes no further, however; it cannot be prosecuted by a portion of the co-owners less than all, it must be by all or by one.³ In pursuance of this general principle, the same rule has been extended to actions brought to recover a fund, or a portion thereof, when by reason of some judicial proceedings this fund stands in the place of the land itself. Thus, where the land of two co-owners had been taken for public purposes, and the amount awarded as compensation had not been paid over, because the owners were at the time unknown, one of them was permitted to recover his portion of the whole sum in a separate action, the money representing the land, and the action itself being analogous to one brought to recover an undivided share of

¹ *Aubuchon v. Lory*, 23 Mo. 99.

² *Cruger v. McLaury*, 41 N. Y. 219. One K. had given a lease in fee of lands, reserving rent, with a clause of re-entry on non-payment. One of his six children and heirs-at-law sues to recover an undivided sixth part of the premises, on account of the condition broken. The Court of Appeals held the action properly brought; that all the heirs need not be joined; and, also, that each of the heirs might have maintained an action for the rent. This last proposition settles the doubt expressed by Comstock J. in *Marshall v. Moseley*, cited in the note (2) to § 219, so far as the law of New York is concerned; and, in that State, although

the rent is entire, and accruing to all the owners in common, each may sue. See *Fisher v. Hall*, 41 N. Y. 416, in which it may seem to be intimated that all must join in a suit to recover possession of the land; but there is actually no discrepancy in the two decisions. In the case last cited all the owners but one united in a suit to recover possession of the *entire parcel* of land; and in such an action a joinder of all the owners is, of course, necessary. The court did not intimate that one co-owner may not sue for his *undivided share*. See also *Hasbrouck v. Bunce*, 3 N. Y. Sup. Ct. 809, 811.

³ *Fisher v. Hall*, 41 N. Y. 416. See *Hubbell v. Lerch*, 58 N. Y. 237, 241.

that land.¹ In certain States, the subject now under consideration is regulated by express statute. Thus, in California, joint owners and owners in common may sue jointly, or severally, or any number of them may sue, and in like manner they may be sued.² Under this statute, a portion of the co-owners of a mine were suffered to unite in an action, and recover the possession of their shares from intruding wrong-doers.³ Another statute of the same State provides that any persons claiming lands under a common source of title may unite in actions relating to the title.⁴ Prior to the statute first mentioned, joint owners,⁵ and, it seems, owners in common,⁶ were required to join in actions brought to recover possession of lands so owned.

§ 221. II. *Actions by joint owners of chattels.* The ownership of chattels by two or more persons is quite different in its incidents from the similar ownership of lands, and it must be described rather than defined. It is not a *joint* ownership in the pure common-law signification of that term, since it does not involve the right of survivorship; there is no survivorship among the co-owners of chattels, whether partners or not, and at the death of one, his interest passes to his personal representatives. On the other hand, this united interest of the co-proprietors is so close that it cannot be separated except by mutual consent. The common law provides no mode of partition. The right of either co-owner may be transferred by any valid act *inter vivos*, and it may be devolved at his death; but it is impossible by any legal compulsory means for one to enforce a partition against his fellow-owners, even when such a division would be physically possible, unless it be true, as said in one case, that such owner may manually separate, and afterwards hold for his own exclusive use, when the chattels themselves are capable of being weighed or measured, so that an accurate division can be easily made,—as in the case of grain.⁷ Even in the settlement of a partnership, the only

¹ Van Wart v. Price, 14 Abb. Pr. 4 (note).

² See *supra*, § 117, note.

³ Goller v. Fett, 80 Cal. 481. See Touchard v. Keyes, 21 Cal. 202. See also Reynolds v. Hosmer, 45 Cal. 616, 631. The statute was held to apply to an action brought to recover damages, being the value of the land which had been sold on a judgment obtained by the defendant,

which judgment had been subsequently reversed on appeal. If one of the co-owners dies, his executor or administrator may be joined with the other co-owners in California.

⁴ Laws of Cal., 1867-8, p. 158, § 1.

⁵ Dewey v. Lambier, 7 Cal. 347.

⁶ Johnson v. Sepulveda, 5 Cal. 149.

⁷ Tripp v. Riley, 15 Barb. 333. It is said in this case—while conceding that

judicial mode of a final division is a sale of all the assets, and their consequent conversion into money, which is distributed among the partners. In this respect, the ownership of chattels by two or more persons is *more* joint in its nature than the joint ownership of lands. From this notion of the *oneness* of the interest residing in the owners of things personal, it follows that a joinder of all in any actions founded upon the property in the chattels is even more necessary, and is less open to exception, than in the case of an ownership of land, since one co-owner of a chattel has no right to its exclusive possession as against the others, and cannot recover its possession from them by action analogous to replevin,¹ or its value in actions like trover or trespass; and since a direct judicial partition of the interests is unknown, it follows by the clearest logic that such exclusive possession, or such partition, cannot be permitted indirectly by means of an action against a third person in the name of one co-owner, the result of which, if successful, would be to give him an exclusive, or an apparently exclusive, right. When the object of the property is land, the interest of each co-owner is regarded as separate *for all purposes except possession*; and, in strict accordance with this notion, he is permitted to sue alone, to recover his *undivided* part of the land, or his part of the rent payable for the use of it; but when the object of the property is a chattel or chattels, the interest of all the owners is conceived of as a unit both in respect to the right of proprietorship and to the possession, and a single one cannot sue for his part of the thing itself, nor for his share of the profits payable for its use, or of its value if it be taken, converted, or sold, or of the damages if it be injured; all must join so as to represent this unity of interest. These general doctrines, which were fully settled in the common law, are unchanged by the new procedure, as will appear from the rules established by the following cases.

§ 222. The part-owners of ships and other vessels are jointly

the common law furnished no remedy — that one co-owner may sever his share in grain and other such articles which can be weighed or measured, and, of course, may hold exclusive possession of the part thus severed; but no authority is cited in support of the proposition; and the judge admits that he is deciding a point for the first time.

¹ One of two joint owners of a chattel cannot maintain an action for the possession thereof against the other; nor in such an action can the defendant have a judgment awarding the possession or a return of the chattel to him; his only judgment is for costs. *Cross v. Hulett*, 58 Mo. 397; *Mills v. Malott*, 48 Ind. 248, 251.

interested, so far as concerns the maintaining of actions touching the property in them or their use, and must all unite in such actions; as, for example in a suit to recover freight, whether from the shipper or from a person to whom it has been paid by the shipper.¹ It would seem, however, that a portion, one or more, of such owners may sue when the residue refuse to join as plaintiffs, by making such dissentients defendants, and inserting appropriate averments in the complaint or petition; this course is certainly proper if full effect is to be given to the provisions of the codes regulating this particular subject, and they are not to be restricted in their application to equitable actions.² Under peculiar circumstances, a portion of the part-owners have been suffered to maintain an action of a similar general nature without even making the others defendants, as stated in the foot-note.³

§ 228. It is clearly the rule, established under the new system as well as under the old, that, properly, all the owners of a chattel, whether partners or not, must join in an action to recover damages for injuries done to it,⁴ or for a wrongful taking or conversion of it,⁵ or to recover its possession.⁶ This rule is so firmly settled that nothing less than an express contract in reference to

¹ *Merritt v. Walsh*, 82 N. Y. 685; *Donnell v. Walsh*, 33 N. Y. 43; 6 Bosw. 621. The first of these cases was an action by certain part-owners to recover their share of the freight which had been collected by the defendant, — an agent for the ship. The complaint alleged that two of the plaintiffs owned each one-sixteenth, and two of them each one-eighth, and the other part-owners were not joined, either as plaintiffs or as defendants. The Court of Appeals held that all should have been joined as plaintiffs; but as the "defect" had not been taken advantage of on demurrer, — it appearing on the face of the complaint, — the objection was waived. The doctrine stated in the text was broadly laid down, the court saying that the part-owners could not sue separately, being joint owners.

² *Coster v. New York & Erie Railroad*, 6 Duer, 677; 3 Abb. Pr. 382. The action was for the rent of a ship which had been leased. The court said that a *legal* action could not be maintained by a portion of the part-owners, but that an *equitable* one might be, under the circumstances and in

the manner stated in the text. If I am right in the positions heretofore advanced, this distinction has been abrogated, and plaintiffs should not be turned out of court because their action is (so called) *legal*, and not *equitable*, when the facts are properly alleged.

³ *Bishop v. Edmiston*, 16 Abb. Pr. 466 (G. T.). The two plaintiffs and one McL. owned a ship. It was insured and lost, and defendant collected the insurance money. He had settled with McL. for the latter's share, and the plaintiffs sue for their shares. The court held that they were tenants in common, and could bring the action without joining the other co-owner. This reason given for the decision was clearly wrong. The decision would have been in exact conformity with the letter and the spirit of the code if McL. had been made a defendant, and the facts in regard to him had been alleged.

⁴ *Wells v. Cone*, 55 Barb. 585; *Hays v. Crist*, 4 Kans. 350.

⁵ *Gock v. Keneda*, 29 Barb. 120.

⁶ *Bush v. Groom*, 9 Bush, 676, 678; *Luke v. Marshall*, 5 J. J. Marsh. 356.

the chattel with one of the co-owners in his own name, by which promises are made directly to him, will suffice to permit a severance. In such a case, while he may sue alone, in virtue of the express undertaking to and with him,¹ yet all the others may, if they so elect, join with him in an action on the contract; for example a sale of the chattel and a promise to pay the price.²

§ 224. The new procedure has not, in general, changed the former rules as to the rights and powers of surviving partners when one or more of the firm have died. Now, as before, the surviving partner or partners have the exclusive possession of the firm assets, for the purpose of paying its debts and settling its affairs. They alone can prosecute all actions of a legal nature, to recover debts, or the possession of property, or its value, or damages for its wrongful conversion or misuse. The remedy on all rights of action held by or due to the firm, is to be pursued in their names, and the personal representatives of the deceased member or members cannot be joined in such actions by virtue of any interest which they may have in the proceeds, and in the final winding up of the partnership accounts. This doctrine, however, does not mean that every thing in action, belonging to the firm at the time of the death of a member, must invariably be enforced by the survivor, or not at all; he is simply the proper and only person to sue, as long as the thing in action or other personal property remains a part of the firm assets. The survivor may assign such a firm asset, and the assignee would thereupon be entitled to sue in his own name, as in the case of any other assignment. When, therefore, a surviving partner had transferred a firm demand to the administrator of the deceased partner, such administrator would be alone able to enforce the collection by suit in his own name, not, however, by virtue of his original representative capacity, but only in his character as assignee.³

§ 225. The rule that all the co-owners of a chattel *must* unite in any action founded upon the property in it, has been pushed by some of the courts to its extreme limits, — to the extent, as it

¹ *Justice v. Phillips*, 8 Bush. (Ky.) 200. An action by one for the price of cattle sold by him and in his name, the promise to pay being made to him, although he and another were the co-owners; the court saying that both might have sued, but that he could sue alone on the express promise.

² *Silliman v. Tuttle*, 45 Barb. 171. Action by *all* the co-owners where a sale had been made, as in the last preceding case, by one of them alone.

³ *Roy v. Vilas*, 18 Wisc. 169; *Brown v. Allen*, 85 Iowa, 806, 811.

seems to me, in fact of nullifying an express and very salutary provision of the reform legislation. I have already discussed the general principle of interpretation referred to with sufficient fulness,¹ and shall simply state the additional decisions, without further comment. When, in the case of partners or other joint owners of personal property, one of them is legally disabled, by means of some act of his own, from asserting or maintaining any right in himself, or, in other words, when he has put himself in such a condition that, if he were the sole owner, he would not have a right of action in reference to the property, it has been held that *all* the partners or co-owners cannot prosecute an action in their joint names, even in respect of the interest of those who have done no acts impairing their individual rights. It is said that, as the right of action is essentially and completely joint, and as therefore all the co-owners must be able to sue, this unity of interest cannot be severed and a recovery permitted for that share of the interest which, as between themselves, belongs to the innocent rather than to the guilty owners. Upon the same principle, and applying in the like manner the rigid doctrine of an absolute unity of right among the co-owners of chattels, the one who had done no act affecting his individual interest cannot sue, in respect of that interest, to recover the portion of the entire demand due to himself by making the others defendants.² It is plain from

¹ See *supra*, §§ 221-223, and cases cited.

² *Estabrook v. Messersmith*, 18 Wisc. 545; *Frans v. Young*, 24 Iowa, 375; *Nightingale v. Scannell*, 6 Cal. 506; and see *Rainey v. Smizer*, 28 Mo. 310; *Clark v. Cable*, 21 Mo. 223; *Andrews v. Moke-lumne, &c. Co.*, 7 Cal. 330. In the first of these cases, *Estabrook and Bromley*, partners, sued for the taking and conversion of certain partnership property. The defendant, a sheriff, justified under an attachment against a certain debtor, that the goods were his property, and that he had assigned them to the plaintiffs in fraud of his creditors, &c. On the trial the fraud was proved against the said judgment debtor, and against *Bromley*, one of the plaintiffs; but *Estabrook*, the other plaintiff, was ignorant of the fraud, and paid full value, and was a *bona fide* owner of the goods jointly with B., and as his partner. The plaintiffs were allowed

on the trial to recover the value of E.'s interest in the goods. The Supreme Court of Wisconsin reversed this ruling, and held that no recovery was possible, either by both partners or by either in an action at law, but that E. could maintain a suit in equity. See opinion of Dixon C. J., quoted *supra*, in note (1) to § 213. In *Frans v. Young*, two persons were joint owners of a horse, and one of them pledged it to the defendant. The two brought this action to recover possession, on the ground that the pledge was invalid against the two. The Supreme Court of Iowa held that the two, suing jointly, could not maintain the action, because one of them was estopped by his own act, and the non-pledging owner could not prosecute an action in his own name, because both co-owners must join in such a suit: citing *Russell v. Allen*, 13 N. Y. 173; *Tripp v. Riley*, 15 Barb. 333. The decisions cited from the Missouri Reports are very em-

the propositions contained in this subdivision, and from the cases cited in their support, that the courts have made no substantial changes, as results of the reformatory legislation, in the rules concerning the parties plaintiff in actions by the co-owners of personal property.

§ 226. III. *Actions by persons having joint rights arising from contract.* The general effect of the provisions contained in the codes upon the common-law doctrines respecting joint rights of action, has already been discussed with sufficient fulness, and I shall simply add to that discussion some examples and illustrations furnished by the decided cases. It was shown that the ancient rule, requiring all the joint obligees, covenantees, and promisees to unite in actions brought upon their contracts, had not been abrogated, and only modified perhaps in the single particular of permitting parties to be made defendants who refuse to join as plaintiffs. The doctrine of equity in this respect was substantially the same as that of the law, and demanded a union of all joint claimants to prosecute their joint right by a suit in chancery. When the doctrine of equity was made statutory, and was applied to all classes of actions, it therefore wrought no change in the practical rules. Of course these provisions of the codes as to parties have not of themselves altered in any manner the principles which the common law had established for determining whether a right created by any contract is joint or several. In actions *ex contractu*, all the persons having a joint interest must be made plaintiffs, and, when one of them dies, the action must be brought or must proceed in the names of the survivors; the personal representatives of the deceased obligee or promisee cannot be joined as coplaintiffs; and in the same manner, in

phatic in their statement of the same doctrine, and strongly repudiate the notion of one co-owner bringing an action, and making his fellow-owner a defendant. In *Nightingale v. Scannell*, the Supreme Court of California, while expressly refusing to decide whether an action could be brought in such a manner by one joint owner, said that, if so, the plaintiff must recover for the entire cause of action. "The law will not tolerate the division of a joint right of action into several actions; the whole cause of action must be determined in one, and thus avoid a

multiplicity of suits." The correctness of all these decisions must evidently depend upon the interpretation to be finally given to the provisions of the codes under review. Do they apply the equitable doctrine which they embody to all actions alike? and are they to be thus accepted according to their plain import? Or, are exceptions to be interpolated which will confine their operation to equitable suits alone? When this question is finally settled by the courts, a uniformity in the procedure will, of course, result. See *Hill v. Marsh*, 46 Ind. 218.

actions *ex delicto* for injuries to personal property, all the joint owners must unite, and, if one of them dies, the action is to be prosecuted by the survivors alone. These common-law rules remain in full force.¹ It has been held that two or more obligees in an injunction undertaking, although their interests were entirely separate, and no joint claim for damages existed, may unite in an action upon it;² but in another similar case, where the action was joint in form, the recovery was limited to the damages suffered by the plaintiffs jointly, and they were not permitted to show what each had separately sustained.³ In an action on a penal bond running to several persons jointly, the common-law rule required all the obligees to be made plaintiffs, although the condition was to perform distinct acts for the benefit of the obligees severally.⁴ When a deed of conveyance of land is given to two or more grantees, the implied covenants of title, if there be any, are joint, and give only a joint right of action, so that one of the grantees cannot sue alone for a breach.⁵ This is a reaffirmance of the rule applicable to the same circumstances under the common law.

§ 227. It has been said, in a decision made since the code, that in an action, whether legal or equitable, by a firm, all the part-

¹ *Bucknam v. Brett*, 35 Barb. 596; 18 Abb. Pr. 119; *Daby v. Ericsson*, 45 N. Y. 786. The survivor was held to be the proper party to sue, although, by an arrangement between himself and the representatives of the estate of the deceased, the proceeds were to belong exclusively to them, and he disclaimed all interest therein. See also *Carrere v. Spofford*, 15 Abb. Pr. n. s. 47, 48, 49.

² *Loomis v. Brown*, 16 Barb. 325. See opinion of Gridley J., quoted *supra*, § 202. The decision was not placed upon the ground that the plaintiffs' rights were joint. It was considered that the code permitted a union of plaintiffs in legal actions, which was not possible at the common law.

³ *Fowler v. Frisbie*, 37 Cal. 34. A number of persons were in possession of land, not jointly, nor in common, but each possessing and cultivating a separate parcel of the whole. An action was brought to recover the entire tract, and, by the provisions of the California statute

referred to in a preceding paragraph, all these occupants were made defendants. An injunction was granted restraining them all from interfering, &c., with the crops, and the ordinary undertaking was given to them. The persons thus enjoined bring this action on the undertaking; and the rule stated in the text was expressly laid down by the court. It would be difficult to reconcile these two cases.

⁴ *Pearce v. Hitchcock*, 2 N. Y. 388, per Jewett C. J. See, however, *Alexander v. Jacoby*, 23 Ohio St. 358, 383. An attachment bond had been given, joint in form, to A., B., and C., and goods belonging to A. and B. had been seized. The suit terminating in their favor, they brought an action on the bond, without joining C. as a coplaintiff. It was held that, though in form joint, the interests of the obligees were several; and the action by A. and B. was sustained.

⁵ *Lawrence v. Montgomery*, 37 Cal. 183.

ners, *even those that are dormant*, must unite as plaintiffs;¹ but this case can hardly be regarded as correct, for it was well settled at the common law that dormant partners need not be joined, and it does not seem that any thing in the code has changed the rule in this particular. When eleven officers [harbor masters] all engaged in the same duties, and each entitled to an equal share, one-eleventh, of the total fees, made an agreement by which one of them undertook to collect all the fees, and to account for and pay over to the other ten their portions of the same, it was held that all of the ten must unite in an action brought against the eleventh to recover from him the amounts due to them which he had received; one could not sue alone.² Persons may sometimes be united as plaintiffs in an action upon a written contract, even though they are not parties thereto, and the terms of the agreement make no direct reference to them, if they, notwithstanding, have an actual interest jointly with the ostensible parties in the subject-matter of the contract, and in the cause of action arising upon it.³ The authorities of a county appropriated \$117,600 to procure volunteers to fill the quota of the county, and ordered \$300 to be paid as bounty to each volunteer out of this fund. Eighty-six persons, who had already enlisted in the military service, agreed with the county officials that, in consideration of being paid said bounty, they would form a part of its quota, and they were thereupon actually enrolled in and credited to the number of volunteers required from the county. The bounty not being paid, the entire eighty-six united in an action demanding judgment for the total amount of their bounties, \$25,800, and the action was held to be properly brought.⁴

¹ *Secor v. Keller*, 4 Duer, 416. Undoubtedly, the dormant partners are interested in the event of the action; but they were equally so at the common law. They were not required to be made parties by the former rule, because the contract was regarded as being expressly made with the *ostensible* partners, who acted as agents for the dormant ones. They seem, therefore, to fall within the provision which allows actions to be brought by persons in whose name a contract is made for the benefit of another. See *Bendell v. Hettrick*, 45 How. Pr. 198; *Lewis v. Greider*, 51 N. Y. 281; 49 Barb. 606.

² *Dean v. Chamberlin*, 6 Duer, 891. The complaint, stating these facts, and alleging that defendant had refused to account for and pay over to the single plaintiff his share, was held bad on demurrer; all should have joined as plaintiffs.

³ *Rutledge v. Corbin*, 10 Ohio St. 478. A "forthcoming bond" having been given to the sheriff for the benefit of certain attaching creditors named in it as the parties benefited, subsequent attaching creditors were permitted to unite in the action on the bond jointly with those first mentioned. See the facts and opinion, *supra*, § 202.

⁴ *Young v. Board of Commissioners*,

§ 228. The common-law theory of joint right, growing out of contract, equally with the joint right arising from the ownership of chattels, has been carried by certain cases so far that manifest injustice has been done, and the enforcement of conceded rights has been defeated, in order that the courts should not depart from an arbitrary and technical rule. These cases have held that, where a contract is made by or with two or more on the one part, so that a joint right of action is held by them, the only possible action is one brought by all, if living; that one of them cannot sue on the contract making his co-contractor a defendant, with proper averments in the pleading, whether he seeks to recover the whole amount due, or only his own individual interest therein, and though the co-contractor refuses to join in the suit for any reason, even if the latter has been paid his share.¹ I have already discussed this topic at large, and fully expressed my opinion upon it.² The decisions last mentioned, and the rule which they approve, are directly opposed to the letter of the codes, which makes no restriction to equitable suits, and are in violent antagonism with the evident intent of the reformed procedure. It was said by the court, in one case, that if an action by one of the creditors was permitted, under the circumstances stated, the debtor would be exposed to subsequent suits and recoveries from the other creditors. This remark shows an entire misapprehension of the meaning and purpose of the statutory

25 Ind. 295, 299. Each plaintiff was only interested to the extent of \$300. There was no joint right in the whole fund. This case, therefore, illustrates, in a clear manner, the proposition heretofore made, — that the code admits of a *joinder of plaintiffs* in instances where such joinder was not permitted at the common law.

¹ *Rainey v. Smizer*, 28 Mo. 810; *Clark v. Cable*, 21 Mo. 228; *Andrews v. Moke-lumne Hill Co.*, 7 Cal. 380. In the first of the cases, the learned judge, in giving his reasons why such an action cannot be maintained by one joint creditor, even though the other refuse to prosecute, said: "If one will say that he has no right of action, and will not sue, why should he not have as much weight as the other who says there is a cause of action?" The answer is very simple: because he has no right, in renouncing his

own claims, to renounce those of his co-contractor. It may be the judge's question is a reason for not permitting one to bring an action in *both* names against the consent of the other; but this is the very reason why he should be allowed to bring the action in his *own* name, and to *save the rights of the defendant* by making the dissident creditor a codefendant, and *thus concluding him by the judgment*. In Kansas a more liberal view has been taken of the statute. When one of two partners had transferred certain firm property without rightful authority, as was claimed, the other copartner was permitted to maintain an action in his own name against the transferee, to recover the value of his own interest in the property. *Hogendobler v. Lyon*, 12 Kans. 276.

² See *supra*, § 204, and notes, and *Hill v. Marsh*, 46 Ind. 218.

provision. It requires the dissenting creditor or co-contractor, who refuses to be a plaintiff, to be made a defendant, for the very purpose of concluding him, by the judgment, from any subsequent prosecution on his own behalf. He is added as a party, and "has his day in court," and this will be a complete bar to a future attempt on his own part, if he should change his mind. No possible injustice could therefore be done to the defendant, and great injustice would necessarily be done to the creditor who desires to enforce his lawful demand, if the utterly arbitrary rule sustained by these and similar cases should be generally approved as the correct interpretation of the codes. The New York Court of Appeals has determined that an action may be maintained by one firm against another firm to recover a sum ascertained to be due, although the two partnerships have a common member who is made a defendant, with proper averments, in the complaint; and the action need not be brought for the equitable relief of an accounting, but for the legal relief of an ordinary money judgment.¹

§ 229. IV. *Actions by persons having several rights arising from contract.* As the principles have been already stated in the preliminary discussions of this section, it is only necessary to add some further illustrations furnished by the decided cases. The common-law doctrine in respect to several rights and actions does not seem to have been changed, unless, possibly, under the operation of the equitable rule embodied in the codes, plaintiffs having strictly several rights may be allowed to unite in legal actions, under circumstances which establish a certain community of interest among them, although under the same circumstances they would have had no such election at the common law. There is at least a tendency shown by some of the decisions towards such a modification of the rule which formerly prevailed in reference to several rights and causes of action. The following examples will serve to illustrate the nature of several rights, and the doctrine as to parties plaintiff in suits brought to enforce them. Tenants in common of a tract of land, who hold their titles by different conveyances from the same

¹ *Cole v. Reynolds*, 18 N. Y. 74. The fundamental principle involved in this decision is the same as that advocated in the text. A party who, in pursuance of the ancient rule as to joint causes of action, should be a plaintiff, is permitted to be a defendant. I simply contend that this principle should be regarded as general.

grantor, each of which contains covenants relating to the land and its use, cannot unite in an action brought against the grantor to recover damages for the breach of such covenants: their interests under the covenants and their rights of action are in every sense several.¹ The obligees in an injunction bond, where the interests interfered with by the injunction are separate, and the injury done to each is distinct, cannot join in a suit to recover damages for these several causes of action; their recovery in such proceeding must be limited to the damages that are strictly joint.² Certain persons executed the following written agreement: "We, the undersigned, agree to guarantee the depositors of W. E. C. [a banker] in the payment in full of their demands against said W. E. C. on account of money deposited with him." Each depositor, it was held, must sue separately upon this guaranty to recover the amount of his individual claim; all the depositors could not join in a single action, because their interests were entirely several, neither one having any interest in the demand of another.³ A number of persons having each subscribed different sums of money for a loan to a certain party in aid of a proposed enterprise, and a committee of three having been appointed to act as agents for the subscribers, which committee entered into a written contract with him containing various stipulations concerning the use of the money, and also an undertaking on his part to repay the amounts advanced, each of the subscribers was held entitled to maintain a separate action against the borrower to recover the sum loaned by himself.⁴ Five persons entered into a written agreement stipulating that, if either or any of them should be drafted during the late war, the others would contribute equal sums to enable him or them to hire substitutes. Three of the parties having been drafted and procured substitutes, one at a cost of \$1,500, and the others for

¹ *Samuels v. Blanchard*, 25 Wisc. 829.

² *Fowler v. Frisbie*, 87 Cal. 84; but, *per contra*, see *Loomis v. Brown*, 16 Barb. 325. It is held in Ohio that the interests of the obligees in an attachment bond are several, although the undertaking is in terms joint. Where such a bond was given to three persons, an action on it by two of them, who were partners, and whose firm property had been wrongfully seized under the attachment, was sus-

tained. *Alexander v. Jacoby*, 23 Ohio St. 858, 888.

³ *Steadman v. Guthrie*, 4 Metc. (Ky.) 147, 151.

⁴ *Rice v. Savery*, 22 Iowa, 470. The court held that the committee might also sue as trustees of an express trust, the promise having been made directly to them, and also that each creditor could sue.

\$1100 each, it was held by the Supreme Court of Indiana that each must sue the others in a separate action for the stipulated indemnity, and a joint action by the three was dismissed.¹ A number of persons being interested in opposing a certain claim and in defending suits thereon, appointed a committee to employ counsel and to conduct the defence, and agreed to pay the expenses incurred by such committee. The cost of the defence not having been contributed, the committee paid the same, and thereby became entitled to reimbursement. This right, it was held, was a several one in each member thereof, and a separate suit by each to recover the sum paid out by himself was proper rather than a joint action by all to recover the whole amount which had been disbursed.² Under the general statutes of New York, providing for the formation of corporations for various purposes, and making the stockholders personally liable under certain circumstances to the creditors of the corporation for the debts thereof, this right of action in the creditors is a several one, and a separate action may therefore be maintained by each creditor. It is admitted,

¹ Goodnight v. Goar, 30 Ind. 418. As the analysis of this contract, given in the opinion of the court, may be instructive in explaining the nature of *several* rights, I quote from it at some length. After stating that the code adopts the equity doctrine as to parties, and applies it to all actions, Frazer J. proceeds: "The present inquiry is reduced to this: Could these plaintiffs have been joined in chancery? In solving this question, we may be aided by considering the nature of the contract upon which the action is brought. The obligations which it imposes are strictly several, each party for himself alone being bound in a certain event to pay. The obligation thus assumed is to each one of the plaintiffs separately by each defendant for one-fifth of such sum as that plaintiff was obliged to pay for a substitute for himself. This proportion due from one cannot be either increased or diminished by the fact that another plaintiff is also entitled to recover from the same defendant a like proportion of the sum paid by him for a substitute. Each plaintiff has an interest only in compelling the defendants severally to reimburse him, and cannot possibly be affected by the success or failure of any

one of his coplaintiffs in the suit. They have, therefore, no joint or common interest in the relief sought, which is the object of the suit. Nor have they any joint or commop interest in the subject or foundation of the action, which is the failure of the defendants respectively to pay according to the contract. The failure to pay Goodnight does not concern any other plaintiff; and so the failure to pay each of the plaintiffs is a matter of entire indifference to the others. If each two of the five persons had mutually contracted, by a separate writing, to pay one-fifth of whatever sum might be necessary to procure a substitute for either if drafted, there would have been twenty separate paper contracts instead of one as now. It was a matter of convenience merely that one writing, executed by all, should have been adopted to evidence their several undertakings; but it imposed exactly the same liabilities as if twenty writings such as we have mentioned had been used. In the latter case it would have been too plain for doubt that each plaintiff must sue separately. Why should it be otherwise now? There is certainly no good reason."

² Finney v. Brant, 19 Mo. 42.

however, that a proper action may be brought against all the stockholders for the benefit of all the creditors.¹ A bond having been given for the payment of a certain sum to the heirs of A., eight in number, upon the death of their mother, it was held, by the Supreme Court in New York, that an action might be maintained by one heir against the obligor, or, he being dead, against his administrator, to recover one-eighth of the entire sum; that the right of the obligees was several and not joint.² Where three towns were each liable for a share of the cost of erecting a bridge, and the proper officers of each—the highway commissioners—procured the same to be erected, but the entire expense thereof was actually advanced and paid out by two of these commissioners, their right of action against the third commissioner to recover the amount thus disbursed for his use was declared to be several, and a joint action against him, it was held, could not be maintained.³

§ 230. *V. Actions by persons having a joint right arising from personal torts.* The common-law rule governing the selection of parties plaintiff in such actions is entirely unchanged. When the personal tort produces a common injury to all, and thus creates a common damage, all the persons affected by the wrong must join in an action to recover the damages. In pursuance of this principle, all the members of a partnership may and must unite in an action for a libel or slander on the firm by which its business is injured. Undoubtedly, the instances in which a common as distinguished from a several injury can be done to a number of individuals by personal torts, must necessarily be rare; but when they do occur, the rule as stated must be applied. A single illustration will suffice. False and fraudulent representations concerning the pecuniary responsibility of a certain person having been made to a partnership, by which it was induced to sell goods to him on credit, and the price of the goods not being paid or recoverable by reason of the purchaser's insolvency,

¹ *Weeks v. Love*, 50 N. Y. 568. It was said that all the cases impliedly hold the doctrine above stated; and the following were cited: *Briggs v. Penniman*, 8 Cow. 887; *Mann v. Pentz*, 8 N. Y. 415; *Osgood v. Laytin*, 5 Abb. Pr. n. s. 1; *Garrison v. Howe*, 17 N. Y. 458.

² *Hees v. Nellis*, 1 N. Y. Sup. Ct. 118.

³ *Corey v. Rice*, 4 Lans. 141. There was no joint or common interest held by the towns which the plaintiffs represented in the sum which was thus advanced; it was not like an advance made by a partnership, or made out of a fund owned by the plaintiffs together. The implied promise of the defendant was, therefore, not to the plaintiffs jointly.

it was decided by the New York Court of Appeals, that an action to recover damages for the deceit should be brought by all the partners jointly.¹

§ 231. VI. *Actions by persons having several rights arising from personal torts.* The converse of the proposition stated in the preceding paragraph is also as true now as it was prior to the new system of procedure. Where a personal tort has been done to a number of individuals, but no joint injury has been suffered and no joint damages sustained in consequence thereof, the interest and right are necessarily several, and each of the injured parties must maintain a separate action for his own personal redress. It follows, therefore, that when a tort of a personal nature, an assault and battery, a false imprisonment, a libel, a slander, a malicious prosecution, and the like, is committed upon two or more, the right of action must, except in a very few special cases, be several. In order that a joint action may be possible, there must be some prior bond of legal union between the persons injured—such as a partnership relation—of such a nature that the tort interferes with it, and *by virtue of that very interference* produces a wrong and consequent damage common to all. It is not every prior existing legal relation between the parties that will impress a joint character upon the injury and damage. Thus, if a husband and wife be libelled or slandered, or beaten, although there is a close legal relation between the parties, it is not one which can be affected by such a wrong, and no joint cause of action will arise. The doctrine above stated has been fully recognized and asserted by the courts since the codes were enacted. A fire company—a voluntary association—having been libelled, a joint action by its members to recover damages against the libeller was held improper; not being partners, and not having any community of *legal* interest whereby they could suffer a common wrong, the right of action was several, and each must sue alone.² The same rule has been applied in the case of two or more persons, not partners, suing

¹ *Zabriskie v. Smith*, 18 N. Y. 322. The action was actually brought by three out of four partners; but, no objection being properly taken, the defect was waived. The court further held that, as the right of action was *joint*, the share of the partner not made plaintiff could not be shown by the defendant, and allowed in

mitigation of damages; although, if the plaintiffs had been entitled as owners *in common*, such a mitigation of damages, and deduction from the recovery, would have been proper and necessary.

² *Giraud v. Beach*, 8 E. D. Smith, 337; *Hinkle v. Davenport*, 38 Iowa, 355, 358; *Stepank v. Kula*, 36 ib. 563.

jointly to recover damages for a malicious prosecution; the action cannot be maintained.¹

§ 282. VII. *Actions in special cases.* Some special cases which do not fall within the foregoing classification will conclude this branch of the discussion. A policy of fire insurance, containing the clause, "loss if any payable to E. B. G., mortgagee," the assured, it was held, could not maintain an action without making E. B. G. a coplaintiff, unless it was alleged and proved that the mortgage to him had been paid off so that his interest had ended.² In several of the States, by virtue of special provisions contained in their codes, partnerships may sue and be sued by the use of the firm name as the parties plaintiff or defendant, in the same manner as though they were corporations. The judgments recovered in such actions against the partnership can only be enforced, in the first instance, against the firm property, and can only be extended so as to bind the individual property of the several partners by a subsequent direct proceeding against them, or some of them, in the nature of a *scire facias*.³ The Kentucky code contains a peculiar provision in reference to actions brought by an assignee of a thing in action where the assignment is *equitable* merely — that is, where it is not expressly authorized by statute; in such a case the assignor must be joined as a party *either plaintiff or defendant*, at the option of the assignee who brings the suit.⁴ The code of the same State expressly

¹ Rhoads v. Booth, 14 Iowa, 575. Three plaintiffs sued jointly for a malicious prosecution. Wright J. said: "As a rule, it is only when two or more persons are entitled to, or have a joint interest in, the property affected, or to the damages to be recovered, that they can unite in an action. Therefore, several parties cannot sue jointly for injuries to the person, as for slander, or battery, or false imprisonment. For words spoken of parties in their joint trade, or for slander of title, they may sue jointly; but not so when two or more sue for slanderous words which, though spoken of all, apply to them all separately; or in a case of false imprisonment or a malicious prosecution, when each, as individuals, are imprisoned or prosecuted. The principle underlying is, that it is not the act, but the consequences which are looked at. Thus, if two persons are injured by the

same stroke, the act is one, but it is the consequences of that act, and not the act itself, which is redressed, and therefore the injury is several. There cannot be a joint action, because one does not share in the suffering of the other." The court further held that the objection might be taken at the trial.

² Ennis v. Harmony Fire Ins. Co., 3 Bosw. 516.

³ See *supra*, § 121. Ryerson v. Hendrie, 22 Iowa, 480.

⁴ Dean v. English, 18 B. Mon. 155. This provision is somewhat different from that found in the code of Indiana, which requires the assignor, in all cases where the thing in action is not assigned by indorsement, — that is, where it is not a negotiable instrument, — to be joined as a *defendant*, in order to answer to the assignment. Indiana code, § 6.

authorizes the owner of land to maintain appropriate actions to recover damages for any trespasses or other injuries committed thereon, although he may not be in the actual possession, or have the right to the immediate possession, at the time when the trespass or other injury complained of was committed.¹ This is undoubtedly the true interpretation of the codes of all the States without any express provision to that effect. The common-law distinction between "trespass" and "case" being abolished, the owner is entitled to maintain an action and recover damages, by alleging the actual facts which constitute the cause of action, although under the former procedure he would, under certain circumstances, sue in "trespass," and under other circumstances in "case." The nature of the *right of action* has not been changed, nor has the amount of damages recoverable been affected, but the special and technical rules which governed the use of the two common-law actions mentioned, have certainly been abrogated.² A legatee or distributee of an estate in the hands of an executor or administrator may, under certain circumstances, maintain an action to recover a debt or demand due to the deceased, if for any reason the personal representative is legally disabled from suing. Thus, for example, where B. in his lifetime was indebted to A., both die, and the same person is made administrator or executor of each estate, a legatee or distributee of A.'s estate may bring an action in his own name against the one who is thus the administrator of B.'s estate, as well as executor or administrator of A.'s estate. This person, as the representative of one estate, cannot sue himself as representative of the other, and therefore the beneficiaries of the creditor

¹ *Beebe v. Hutchinson*, 17 B. Mon. 496.

² *Brown v. Bridges*, 81 Iowa, 188, 145. A plaintiff suing, as owner of land, for injuries done by a wrong-doer, cannot, consistently with the plain import of the codes, be nonsuited, because he was out of possession, and not entitled to possession. Undoubtedly, he may not be able to recover such damages as he would have recovered if the action was the common-law "*trespass*," — that is, damages for the wrong done to his *possession* as well as to the inheritance; but he is certainly entitled to recover such damages as he would have obtained if the action was the com-

mon-law "*case*," — that is, damages for the injury to the inheritance. To nonsuit the plaintiff, is to restore the old distinctions between these technical actions. This doctrine is expressly sustained by the Supreme Court of Missouri; *Fitch v. Gosser*, 64 Mo. 267; and by a very recent decision in New York, *Adams v. Farr*, 5 N. Y. Sup. Ct. 59; citing *Robinson v. Wheeler*, 25 N. Y. 252; *S. P. Foster v. Elliott*, 88 Iowa, 216, 224. But see *Townsend v. Bissell*, 5 N. Y. Sup. Ct. 583, per Gilbert J., a contrary dictum, which, in the face of these authorities, and of the code itself, is clearly a mistake.

estate are permitted to prosecute the action. It seems, also, that such action can be brought either by one of the legatees or distributees, or by all of them jointly.¹

§ 233. It is held in New York that a mother may maintain an action for the seduction of her infant daughter where the father is dead, and the daughter is dependent upon the mother, although the latter has remarried.² This rule has also been extended to the case when the father is not dead, but has abandoned his wife, who lives separate and apart from him, and maintains herself and family by carrying on a business in which the daughter is actually employed as an assistant, rendering substantial services. The action being founded upon the relation of master and servant, and not upon that of parent and child, and the mother carrying on a business in which the daughter is employed as a servant, all the requisites of the general doctrine relating to the action of seduction are fully complied with.³ These decisions are based upon common-law principles independently of any changes made by statute. The codes of several States, however, contain special provisions authorizing actions to be brought by fathers, or, in case of their death or desertion of their families, by mothers, and by guardians, to recover damages for the seduction of, or for the death of or injuries to, their children or wards.⁴ A woman is permitted, in a few States, to maintain an action and recover damages for her own seduction.⁵

¹ *Fisher v. Hubbell*, 65 Barb. 74; s. c. 1 N. Y. Sup. Ct. 97. It was also held that Hubbell — the common trustee — should be made a defendant, both as administrator of A.'s estate, and as executor of B.'s estate; of the latter, because he thus represented the debtor; and of the former, because he was the regular plaintiff, and should be made a party in order to conclude the estate by the judgment. It was said that, in order to bind the estate of a deceased person, his administrator or executor must be made a party in his representative capacity; it is not sufficient that he be made a party. See *Haynes v. Harris*, 33 Iowa, 516. In Missouri, the distributees of an estate in the hands of an administrator may, before an order for distribution is made, all unite in a joint action on the administrator's bond against him and his sureties. Whether such joint action would be proper after the order for

a distribution, *quære*. *Kelley v. Thornton*, 56 Mo. 325. In Kentucky it has been expressly decided that several distributees cannot unite in a legal action against the administrator to recover the shares found due to each upon a settlement of the estate. *Pelly v. Bowyer*, 7 Bush, 513.

² *Lampman v. Hammond*, 3 N. Y. Sup. Ct. 293; *Gray v. Durland*, 50 Barb. 100, 51 N. Y. 424; *Furman v. Van Sise*, 56 N. Y. 435; *Badgley v. Decker*, 44 Barb. 577.

³ *Badgley v. Decker*, 44 Barb. 577.

⁴ See *supra*, § 120, where the States are enumerated. A statute which dispenses "with any allegation or proof of loss of service" does not change the rules of the law as to the parties; the seduced woman cannot bring the action. *Woodward v. Anderson*, 9 Bush, 624.

⁵ See *supra*, § 120.

§ 234. *Second: Actions by and between Husband and Wife.*

The common-law rules as to the power of a wife to bring actions in her own name, and as to the necessity of making husband and wife coplaintiffs in all actions where she could be a party at all, relating to her property or to wrongs suffered by her, have been either utterly swept away or greatly modified in all the States which have adopted the reformed system of procedure. These common-law requisites were concisely stated in a former paragraph of this section.¹ In equity, while, as a general rule, the husband was joined as a coplaintiff even in suits touching her equitable separate estate, yet, when their interests were at all antagonistic, and especially when the proceeding was in any manner adverse to him, she was permitted to sue without uniting him with her, and even to make him a defendant. Her action, however, was prosecuted in her name by a next friend.²

§ 235. The statutory legislation upon this subject entirely abandons the common-law theory, and, so far as it resembles any previous doctrine, rather adopts that of the equity tribunals, although in most instances it is far in advance of the greatest liberality ever allowed by the courts of chancery. In New York there is now no instance in which a husband and wife must, or even may, be joined as coplaintiffs, by virtue merely of the marriage relation, in actions affecting either his or her individual rights. If, however, the husband and wife are both in any manner interested in the subject-matter of the controversy, they may be united as plaintiffs; but this would result from the existence and nature of the common interest, and not from the marital relation. Special statutes, in reference to married women and their property, provide that a wife must sue alone, and without a guardian or next friend, in all actions relating to her separate property, which includes all the estate, real and personal, which she owns at the time of the marriage, and all that she may acquire subsequently thereto, and all of her personal earnings, and the proceeds of her business; in all actions upon contracts made by and with her in reference to her property, or in the course of any business which she may carry on; and in all actions brought to recover damages for any injuries to her person or character;

¹ See *supra*, § 191.

² Story, Eq. Pl., §§ 61, 63; 1 Daniell's Chan. Pl. (4th Am. ed.), pp. 109, 110.

and in all actions against her husband.¹ It thus appears that in no case is it proper for a husband to be united as coplaintiff with his wife, in New York, merely because they *are* husband and wife.

§ 236. There are two general types or forms of the statutory provision, as contained in most of the codes, while in a few of the States the legislation is special, as it is in New York. The first of these forms is the following: "When a married woman is a party, her husband must be joined with her, except that, (1) When the action concerns her separate property, she *may* sue alone; (2) When the action is between herself and her husband, she may sue and be sued alone; but in no case shall she be required to sue or defend by guardian or next friend [except she be under the age of twenty-one years — *Indiana*]"² The other form differs from this in requiring the interposition of a next friend. "When a married woman is a party, her husband must be joined with her; except when the action concerns her separate property, she *may* sue alone, without her husband, by a next friend. When the action is between herself and her husband, she may sue or be sued alone; but in every such action, other than for a divorce or alimony, she shall prosecute and defend by her next friend."³ In Iowa, the change is more radical, and reaches the same result as the New York statutes. "A married woman may, in all cases, sue and be sued, without joining her husband with her, to the same extent as if she were unmarried; and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman."⁴ Also, "Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage,

¹ Laws of N. Y., 1860, ch. 90, § 7; Laws of 1862, ch. 174, §§ 3, 5, 7. The 114th section of the New York code remains unrepealed, although these later statutes have entirely abrogated or modified most of its provisions.

² This form is found in Indiana code, § 8; Minnesota code, § 29; California code, § 370; Wisconsin code, ch. 122, § 15; South Carolina, § 187; Oregon, § 80; Nevada, § 7; Dacotah, § 67; Florida, § 65; North Carolina, § 56; Idaho, § 7; Wyoming, § 85; Montana, § 7. The provision in California is slightly mod-

ified, but is substantially the same. In the first subdivision the following is inserted after the words "separate property," viz., "or her right or claim to the homestead property." A third subdivision is added, as follows: "(3) When she is living separate and apart from her husband, she may sue or be sued alone." The last clause, relating to a guardian or next friend, is omitted; otherwise the provision is identical with that given in the text.

³ Ohio code, § 28; Nebraska code, § 33.

⁴ Iowa code, 1878, § 2562.

the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."¹ And, "A wife may recover the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law and in equity for the preservation and protection of her rights and property as if unmarried."² In Kansas, "A woman may, while married, sue and be sued in the same manner as if she were unmarried."³ The Missouri statute provides that "When a married woman is a party, her husband must be joined with her in all actions, except those in which the husband is plaintiff only, and the wife defendant only, or the wife plaintiff only, and the husband defendant; and in all such actions, when the husband is plaintiff and the wife defendant, or the wife plaintiff and the husband defendant, it shall be lawful for the wife to sue or defend, by her agent or attorney, as she may think proper; and in all actions by husband and wife, or against husband and wife, they may prosecute the same by attorney, or they, or either of them, may defend by attorney; and it shall not be necessary for the wife, in any such action, to sue with her husband by next friend, or to appear and defend by next friend."⁴ Certain other special provisions may be properly stated in this connection. "When a husband has deserted his family, the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and with the same effect."⁵ In addition to the general clause already quoted, the Indiana code contains the following: "Husband and wife may join in all causes of action arising from injuries to the person or character of either, and both of them, or from injuries to the property of either, and both of them, or arising out of any contract in favor of either, and both of them."⁶

¹ Iowa code, § 2204.

² *Ibid.* § 2211.

³ Gen. Stat., 1868, ch. 62, § 8; code, § 26.

⁴ Missouri civil code; "Wagner's Stat.," art. 1, § 8; Laws of 1868, p. 87. Land belonged in fee to a wife, but the husband had a life-estate therein; it was conveyed by deed to the defendant, who promised to pay the purchase price to the husband. In an action brought by the husband to enforce the vendor's lien for

the price, the wife was held not to be a necessary party. *Reugger v. Lindenberger*, 58 Mo. 364.

⁵ Minnesota code, § 34; Iowa, § 2564; Indiana, § 26.

⁶ Indiana code, § 794. I confess myself unable to guess even at the meaning of this provision. Does it enact that they may unite when the injury is to some *joint* right, as to property owned by them both, etc.? If so, why insert the word *either*?

§ 237. By summing up and comparing these various statutory requirements, we find the general rule to be, that, in all actions where the wife is a party, — and, of course, where she is a plaintiff, — the husband must be joined with her, thus retaining the rule which prevailed before the new system. If, however, the action concerns her separate property, or if it is directly between herself and her husband, she may sue alone, — that is, without uniting her husband with her. In respect to these classes of actions there is, however, a difference in the practice. In certain States it is expressly required, that, when she sues without joining her husband, it must be by a next friend, while in others she need not resort to any such assistance in prosecuting her actions. It does not fall within the scope of this treatise to determine the nature of a married woman's "separate property," as spoken of in these various statutory provisions relating to parties.¹ In some States the wife is clothed with most of the capacities and powers which belong to a single woman, and in others, the departure from the common-law doctrine is by no means so complete. Wherever the general statutory rule just stated prevails, the husband and wife must be united in all actions where such joinder was formerly required, other than the two classes expressly excepted, — that is, actions concerning her separate property, and those directly between herself and her husband. Every suit, therefore, brought to recover damages for the personal injury, bodily or mental, sustained by the wife from any tort to her person or character, must, in those States, be prosecuted by the husband and wife jointly. The conclusions thus reached are true only in the States whose codes contain one or the other of the two general forms of the statutory provision quoted in a foregoing paragraph. As these forms are found in many of the States, they furnish the *general doctrine* of the new procedure in reference to the union of husband and wife in actions relating to her interests. In New York, Iowa, Kansas, and other States which have entirely abandoned the common-law notions upon this subject, the husband is not to be made a party plaintiff in any action brought by the wife, whether it concerns her separate property,

It certainly cannot be possible that when an injury is done to the *husband* the wife may join.

¹ In Minnesota, while the statute defining the wife's separate property was

operative, land devised to a married woman became her separate property, so that in actions concerning it she could sue alone. *Spencer v. Sheehan*, 19 Minn. 338, 346.

or whether it is based upon a tort done to her person or character, or upon a contract entered into by her. On the other hand, the somewhat blind and cumbrous phraseology of the Missouri code, when properly interpreted, limits the cases in which the wife may sue and be sued alone, to actions brought by the wife directly against the husband, or by the husband directly against the wife, and in which there are no other parties; in actions concerning her separate property, both must appear as plaintiffs on the record.¹

§ 238. Wherever the general rule as above described prevails, wherever it is provided that the wife may sue alone in actions concerning her separate property and in certain others, as designated, it is generally, if not universally held, that the language of the statute — “may sue.” — is permissive and not compulsory; she has her option to sue in her own name alone, or to unite her husband as a coplaintiff; either mode of bringing the action is legal and proper.² The rule in Missouri seems to have vacillated; for it has been held that the husband need not be made a party when the action concerns the wife’s separate property, but she must sue in such case by a next friend.³ When a note and mortgage were given to a husband and a wife jointly as security for the payment of money of the wife loaned to the maker of the note, on the death of the husband the wife may sue alone to enforce the security, both on the ground that the action concerns her separate property, and because she is the surviving payee and mortgagee.⁴ In Indiana, the wife is never required to sue by a next friend.⁵ In Iowa, prior to the latest modification

¹ See *supra*, § 236.

² *Kennedy v. Williams*, 11 Minn. 314, action by husband and wife on a note belonging to the wife; *Nininger v. Board of Commissioners*, 10 Minn. 183, action by wife alone on a bond belonging to herself; *Wolf v. Banning*, 3 Minn. 202; *Gee v. Lewis*, 20 Ind. 149, action by both for money due the wife; *Adams v. Sater*, 19 Ind. 418, action by the wife alone; *Martindale v. Tibbetts*, 16 Ind. 200; *Hollingsworth v. State*, 8 Ind. 257; *Corcoran v. Doll*, 32 Cal. 82, action by both on a note given to the wife; *Calderwood v. Pyser*, 31 Cal. 333, action by both to recover lands of the wife; *Kays v. Phelan*, 19 Cal.

128, action by wife alone for price of land sold by her; *Van Maren v. Johnson*, 15 Cal. 308, action by both for money due wife before marriage; *Norval v. Rice*, 2 Wisc. 22; *Botkin v. Earl*, 6 Wisc. 398.

³ *Claffin v. Van Wagoner*, 32 Mo. 252. The rule thus laid down corresponds with that established by the second general form of the provision found in many codes. It is clearly inconsistent with the provision quoted in § 236 from the Missouri statute as it now stands. There has probably been a modification in the legislation of that State.

⁴ *Shockley v. Shockley*, 20 Ind. 108.

⁵ *Harlan v. Edwards*, 18 Ind. 480.

of the statute as already stated, which obviates the necessity of joining the husband in any action, the wife could sue alone in reference to her separate property.¹ The husband is an indispensable party in all cases where the wife is a party, "except that where the action concerns her separate property she *may* sue alone," but she is not required to do so. "The separate estate of a married woman in Kentucky is that alone of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases. All her real estate does not belong to her as her separate property. That character must be imparted to the property by the instrument which invests her with the right to it."² It has been held in Kansas that a wife can only maintain an action in her own name on a note or other obligation, upon the ground that the demand is her separate property.³ When a married woman in California engages in business in her own name as a "sole trader," under the statute authorizing such business,⁴ she is vested "with the exclusive ownership and control of all the money and property invested in the trade or business in which she is engaged; and as to such business and property she is entirely independent of her husband," and may, and perhaps must, bring all actions concerning the same without joining her husband as a coplaintiff.⁵ A married woman may sue alone in the same State to recover the rent of her premises which have been leased.⁶

§ 239. The following are instances in which it has been held, under the special provisions of the New York statutes, that the wife must sue alone, although the joinder of the husband does not, as decided by the Court of Appeals, defeat the action entirely. The doctrine which lies at the foundation of these decisions is also embodied in the statutes of the few other States which have followed the example of New York by utterly abrogating the common-law rules concerning suits by husband and wife. The cases themselves are therefore authoritative precedents in interpreting the corresponding statutory provisions of

¹ *Kramer v. Conger*, 16 Iowa, 484.

² *Beaumont v. Miller*, *Stanton's Ky. code*, p. 42, per Stiles J.; *Petty v. Malier*, 14 B. Mon. 246, per Simpson J.

³ *Hadley v. Brown*, 2 Kans. 416. The statutory provision quoted above, in § 236,

is certainly broader than the doctrine of this case.

⁴ Act of April 12, 1852.

⁵ *Guttman v. Scannell*, 7 Cal. 456,

458. See *Swain v. Duane*, 48 Cal. 358.

⁶ *Snyder v. Webb*, 8 Cal. 83.

those States. The wife should sue alone on an award made in her favor;¹ to recover damages for the taking or the conversion of her personal property;² in an action on a lease executed in her name;³ to recover possession of her lands;⁴ to recover damages for trespasses upon her lands;⁵ to recover damages for an assault and battery upon herself;⁶ to recover damages for the seduction of her own female servant when she carries on a business in which the servant is employed;⁷ to recover damages for false and fraudulent representations by which she was induced to convey her lands;⁸ in an action against a common carrier to recover the value of articles lost or destroyed, although gifts from her husband;⁹ to recover the price agreed to be paid for personal services rendered to the defendant.¹⁰

§ 240. As the result of the New York statutes modifying the legal relations between the husband and wife, either may, under certain circumstances, maintain actions of a legal nature, that is, upon a legal cause of action, and seeking to obtain legal relief, against the other. It would seem, however, that such actions must be based upon rights of property or of contract. When the husband, prior to the marriage and in consideration thereof, gave his intended wife a promissory note, it is a valid demand in her hands, and she may, subsequent to the marriage, maintain an action against him upon it.¹¹ The wife may bring an action in her own name against her husband to recover the possession of

¹ *Palmer v. Davis*, 28 N. Y. 242.

² *Ackley v. Tarbox*, 81 N. Y. 664.

³ *Draper v. Stouvenel*, 35 N. Y. 507.

⁴ *Darby v. Callaghan*, 16 N. Y. 71;
Hillman v. Hillman, 14 How. Pr. 456.

⁵ *Fox v. Duff*, 1 Daly, 196.

⁶ *Mann v. Marsh*, 35 Barb. 68.

⁷ *Badgley v. Decker*, 44 Barb. 577. In this case the wife, living separate from her husband, kept a boarding-house, and her daughter aided her by personal services.

⁸ *Newbery v. Garland*, 81 Barb. 121.

⁹ *Rawson v. Pennsylvania Railroad*, 2 Abb. Fr. n. s. 220.

¹⁰ *Adams v. Honness*, 62 Barb. 326; but see, *per contra*, *Beau v. Kiah*, 6 N. Y. Sup. Ct. 464. A married woman, living with her husband and family, was employed by the defendant, and, under such employment, rendered services in

defendant's family as a nurse. In an action brought by her to recover the compensation agreed to be paid for such work and labor, the Supreme Court held that she could not recover; that her services belonged to her husband. The statute which expressly authorizes her to maintain an action for her services was limited to the case in which such services are performed in some business carried on by her. This decision is a virtual repeal of the statute, and is directly opposed to *Brooks v. Schwerin*, 54 N. Y. 348, which holds that the wife's earnings from services rendered in the household belong to the husband, while those arising from services rendered elsewhere belong to her; but see *Sloan v. New York Central Railroad*, 4 N. Y. Sup. Ct. 185.

¹¹ *Wright v. Wright*, 54 N. Y. 487; 59 Barb. 506.

land which is her separate property.¹ She may also sue him to recover her personal property ; or for money loaned to him ; or to recover the value of services rendered in his business under an express contract, or under such circumstances that a promise to pay therefor would be implied.² When the husband and wife are owners in common of land, she may maintain a suit against him for a partition.³ The foregoing cases all involve and are based upon rights of action growing out of her ownership of property, or out of contract in reference to such property, or to her services. No rights of action arise from personal torts committed by the husband, and she is not permitted to maintain actions against him to recover damages for such torts, as an assault and battery,⁴ or a slander.⁵ A husband cannot recover in an action against his wife for his services rendered to her in the oversight and management of her separate property, there having been no express agreement for the payment of a compensation, and the circumstances being such that no promise could be implied.⁶

§ 241. In those States whose codes conform to the general type stated and described in a preceding paragraph, the rules as to parties plaintiff in actions for torts to the wife's person or character remain unaltered. At the common law the husband and wife were required to join as plaintiffs in all actions for damages from the wife's personal suffering, either bodily or mental, while he sued alone in all actions for damages suffered by himself exclusively, from the loss of her society, and from expenses and the like occasioned by her injuries. Except in New York, Iowa,

¹ *Minier v. Minier*, 4 Lans. 421. The court draw a distinction between a suit like this affecting her separate property and one brought to recover damages for a tort, such as slander, or assault and battery. See, however, *per contra*, *Gould v. Gould*, 29 How. Pr. 441. This decision is in plain opposition to the spirit and letter of the remedial statutes.

² *Adams v. Curtis*, 4 Lans. 164. The action was against a firm of which the husband was a member. She may be his creditor. *Re Alexander*, 87 Iowa, 454.

³ *Moore v. Moore*, 47 N. Y. 467. The husband and wife may sue jointly for the conversion of chattels which they own jointly. *Chambovet v. Cagney*, 85 N. Y. Superior Ct. 474.

⁴ *Longendyke v. Longendyke*, 44 Barb. 886.

⁵ *Freetley v. Freetley*, 42 Barb. 641.

⁶ *Perkins v. Perkins*, 62 Barb. 531. No express contract was pretended ; and the plaintiff relied upon an implied promise. All that the court decided was, as stated in the text, that no promise could be implied, and, therefore, no cause of action was made out. P. Potter J. went, however, much further, and denied that either husband or wife could ever maintain an action against the other upon a contract, express or implied. These conclusions of the learned judge are directly opposed to the cases cited above, and to the express language of the statute.

and the few other States which have made the wife in all respects like the single woman in regard to the capacity of instituting and prosecuting judicial controversies, these ancient doctrines of the common law have been preserved. The wife should certainly not be joined as a plaintiff with her husband in any action for tort to *his* property, or for fraud in relation thereto, unless she has some interest in or ownership of the subject-matter which has also been affected by the wrong. Thus, where a husband is induced by the false and fraudulent representations of the grantor to purchase land, and the title is taken in his wife's name, but the consideration is wholly paid by him, she having in fact no prior legal interest in the land or in the price, an action for the deceit cannot properly be brought in their joint names; he is the only person interested, and should be the sole plaintiff.¹ The same has been decided in respect to an action for fraud practised upon a husband and wife by which a conveyance of land was obtained from them. The land thus conveyed was alleged to have been their homestead, but in fact the wife had no legal interest in it, the title having been exclusively in the husband. A joint action to recover damages for the deceit under these circumstances was held to be improper.² If, however, the wife has a legal interest or ownership in the subject-matter which has been injured or lost by the wrongful act or fraud of the defendant, a joint action in the names of both husband and wife to recover damages is proper. This doctrine has very recently been approved by the New York Court of Appeals, and applied to the

¹ *Bartges v. O'Neil*, 18 Ohio St. 72; *Barrett v. Tewksbury*, 18 Cal. 384. In the first-named case, the action, being in the names of the husband and wife jointly, was entirely defeated; the misjoinder was made fatal to the recovery by the husband. The second case presented similar facts. The action was by husband and wife to recover damages for deceit practised in the same manner. The land purchased would have been "common property" under the laws of California,—that is, property acquired during the marriage, but over which the husband has the entire control. Baldwin J. said (p. 336): "The complaint does not aver that the wife had any special or several interest in the purchase-money paid for this lot, nor in the business which the defendant is

charged with having injured by the imputed fraud. At most, the money and the land bought, if the title passed, would seem to be only common property, being possessed or acquired during coverture. For an injury to this, effected by deceit or otherwise, the husband would be entitled to recover; there is no necessity or reason for joining the wife. For any fraud or deceit practised by the defendant, whether the injury was wrought through the form of a contract or not, such injury affecting the common property, the remedy is by the husband alone, who is the representative of the common property, and has the management and control of it." See *Stepank v. Kula*, 36 Iowa, 568.

² *Read v. Sang*, 21 Wisc. 678; but see *Simar v. Canaday*, 58 N. Y. 298.

following state of facts. The owner in fee of land in which his wife had no interest except her inchoate right of dower, was induced by false and fraudulent representations to sell and convey the premises to the defendant by a deed in which the wife joined, and to receive in consideration thereof certain mortgages which were in fact worthless. A joint action by the husband and wife to recover damages for the deceit was sustained, the husband, it was said, being entitled to sue on account of his ownership of the fee, and the wife, on account of her inchoate dower right.¹

§ 242. When a wife has suffered bodily injury, either by violence or by negligent or unskilful acts of the wrong-doer, and

¹ *Simar v. Canaday*, 53 N. Y. 298, 806, per Folger J. "Having thus shown that both Simar and his wife had a cause of action, the objection of the defendant, in its exact letter, returns. The objection was that no *joint* cause of action in favor of the plaintiffs had been made out. The cause of action we have found in the husband is, that he is defrauded of the fee of the premises; that in the wife is, that she is defrauded of her inchoate right of dower, which is contingent upon his title in fee. They are not strictly the same thing, yet they are bound together in the same property; they are taken out of the owners by the same instrument, and that instrument is induced and the two rights are lost by the same fraudulent acts. One recovery will satisfy both claims, and one judgment will be a bar to another action by either of the plaintiffs. The acts of the defendant were done at one time to both plaintiffs, and were an injury to both plaintiffs, inflicted at the same time; hence there is such a common interest in the subject of the suit as to authorize them to join in one suit, although the injury which each sustained is separate and distinct. In equity this rule has often been announced. And the code having abolished all distinction between actions at law and suits in equity, and provided for but one form of action, then enacts, that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. Here both plaintiffs have an interest in the subject of the action, and both have an interest in the re-

lief demanded." This is certainly an extraordinary decision, and introduces a rule before, I think, unthought of,—namely, that whenever the owner in fee is induced by fraud to convey his land, and the wife joins in the deed, the two may maintain a joint action and recover a single judgment *in solido* for their joint damages. Granting that she has a right of action for the loss of her inchoate dower, and even that she and her husband could be made coplaintiffs in one suit, it is plain that they have no common or joint right to damages, and that the damages to which they are respectively entitled must always be unequal. The husband's measure of damage is the *value of the whole land* and of his estate in fee therein; the wife's measure of damage, at most, is the value of her inchoate dower right. Assuming that this inchoate dower is susceptible of measurement, so that the value thereof can be ascertained, it must necessarily be far less in amount than the value of the fee. Yet this decision gives to the wife, in virtue of her inchoate dower, a joint and equal right with her husband in the entire value of the premises which had belonged to him alone. The decision cannot be supported either on principle or on authority; the essential difference between the husband's fixed certain interest, capable of being ascertained, and the wife's uncertain, contingent interest, under all possible circumstances much less than her husband's, seems to have utterly escaped the attention of the court.

the injury is of such a nature as to disable her for a while and make medical or other attendance necessary, a joint action is not the proper one in which to recover the husband's damages for his loss of her society and for the expenses caused by the wrong done to her; such damages can only be recovered in an action brought by the husband as the sole plaintiff.¹ If, on the other hand, the compensation sought is for the personal wrong done to her, both must unite as plaintiffs in all those States which follow the general form; as, for example, in suing for a slander or libel upon the wife, the husband and wife must sue jointly, unless he has suffered some special damage, and the object of the proceeding is to obtain compensation therefor.² The same rule applies to all torts to the person of the wife; for the injuries to her, both husband and wife must join; for the injuries special to him, such as loss of her society, expenses incurred, and the like, he must sue alone.³ It has even been held in a State where the cause of action for a personal tort survives, that, when a claim for damages against a physician for malpractice existed in favor of a wife, and she died, her husband must be joined as a coplaintiff with her administrator in prosecuting an action to enforce such demand.⁴ If the gravamen of the action is a tort to the wife's person, the general rule above stated applies, and the husband must be joined, although the action might be brought in form *ex contractu*. As an example, if the wife has been injured by the negligence or other wrongful act of a carrier, who was transporting her as a passenger, although the action might be in form based upon the contract of passage made with her, the injury being proved in enhancement of damages, or might be in form directly based upon the tort, yet in either case the very gist of the claim would be the negligent or tortious act of the defendant, and the husband and wife must

¹ *Kavanaugh v. Janesville*, 24 Wisc. 618, action for injuries to wife from a defective sidewalk; *Barnes v. Martin*, 15 Wisc. 240, assault and battery on wife; *Smith v. St. Joseph*, 55 Mo. 456, 458; *Dailey v. Houston*, 58 Mo. 861, 866.

² *Johnson v. Dicken*, 25 Mo. 580; *Enders v. Beck*, 18 Iowa, 86. This latter decision was made under a statute different from that which is now in force in Iowa.

³ *Long v. Morrison*, 14 Ind. 595, 597; *McKinney v. Western Stage Co.*, 4 Iowa, 420. See remark in last preceding note. *Dailey v. Houston*, 58 Mo. 861, 866; *Smith v. St. Joseph*, 55 Mo. 456, 458; *Rogers v. Smith*, 17 Ind. 323; *Ohio & M. R. R. v. Tindall*, 18 Ind. 866; *Boyd v. Blaisdell*, 15 Ind. 78.

⁴ *Long v. Morrison*, 14 Ind. 595.

therefore unite as coplaintiffs in order to recover the damages resulting from her personal injuries.¹

§ 243. The doctrine stated and illustrated in the preceding paragraph obtains alone in those States whose codes conform to the general type. In the few others whose statutes have completely abrogated the ancient principles respecting the marriage relation, the wife must sue alone in her own name in actions based upon torts to her own person, as well as in actions concerning her own property, or in those founded upon her contracts. Cases illustrating this rule as it prevails in New York, have already been given.² Similar conclusions have been reached by the courts of the other States whose legislation is substantially the same as that of New York. Thus it is held in Iowa, under the existing statutory provisions, that a wife must be the sole plaintiff in an action instituted to recover damages for a malicious prosecution of herself; the joinder of her husband is improper, since the damages when recovered are her own separate property, in which he has no interest or share;³ and, on the same principle, a suit for a libel upon herself must be brought by the wife alone.⁴

§ 244. While the general rule of the new procedure, as it is found in most States, requires a joinder of husband and wife in actions for torts to her person, she may sue alone to recover damages arising from torts and negligences and other wrongs to her own property; these actions fall within the language of the codes, and plainly "concern her separate property." Thus it has

¹ *Sheldon v. Steamship "Uncle Sam,"* 18 Cal. 526; *Warner v. The Same*, 9 Cal. 697. Each of these cases was an action by husband and wife to recover damages against the carrier, the wife being the passenger. The plaintiffs alleged and proved deceit by defendant, wrongful detention of the passengers, by which they suffered greatly, — were made sick, and other personal injuries. The defence relied on a misjoinder of the plaintiffs. Cole J. said (p. 533 of the first case): "We agree that the plaintiffs cannot recover jointly in an action *ex contractu*, for a breach of the contract; but this does not appear to us a sufficient answer to a recovery in the present case. . . . It is well settled that for an injury done to the per-

son of a married woman, she must join with the husband in the action; and it is immaterial that the injury is charged to have been committed in violation of a contract. If the act producing the injury be itself tortious, it may be so treated for all remedial purposes, and it would be absurd to hold that, because the wrong done amounts to the breach of a contract, it is therefore purged of its tortious character." The opinion holds that the common-law rule in the case of torts to wife's person is unchanged in California.

² See *supra*, § 239.

³ *Musselman v. Galligher*, 32 Iowa, 388.

⁴ *Pancoast v. Burnell*, 32 Iowa, 894. See *Shuler v. Millsap's Ex'or*, 71 N. C. 297.

been held that the wife may maintain a suit in her own name to recover damages for a trespass to land owned by her, "although her husband occupied the land in the usual manner with her and their family, and cultivated it, but had no legal or other rights in it."¹ If she can prosecute a suit for trespass, she can certainly do the same when the injury is negligent instead of violent and intentional. On the other hand, there are circumstances under which an action should be maintained by the husband alone, although the wife may have or seem to have some interest in the subject-matter of the controversy. Thus in California, he must sue alone in actions relating to the "common property" of the husband and wife, and in those relating to "homesteads" as the same are defined and regulated by the statutes of the State.² These subjects, however, depend entirely upon the special provisions of the statutes in the several commonwealths, and have no proper connection with the general system of procedure established by the various codes. It seems that the husband alone can sue for a conversion or loss of or injury to those articles of personal use belonging to the wife, — her clothing and ornaments, — which at the common law constitute her *paraphernalia*.³

§ 245. Whether, under the legislation of the various States, actions for tort can be maintained by the wife against the husband, or by the husband against the wife, does not seem to have been definitively settled by judicial decision. The departure from the ancient theory of the marriage relation has been as great in New York as in any other commonwealth, and far greater than in most, and yet, as has been shown, the courts of that State have declared against the possibility of actions between the spouses for any personal torts committed by one upon the other, such as libels, assault and battery, and the like. The same result would seem to be inevitable under the more restricted legislation of other States, for their statutes which modify the common-law doctrines of marriage are confined⁴ in their terms to her power over her separate property and over contracts. Actions between husband and wife, based upon torts done to property, have arisen,

¹ *Boos v. Gomber*, 24 Wisc. 499. The title being in her, the possession would be hers if such possession were deemed necessary to the maintenance of the action.

Guioed v. Guioed, 14 Cal. 506; *Cook v. Klink*, 8 Cal. 847; *Poole v. Gerrard*, 6 Cal. 71.

² *McCormick v. Penn. Cent. R. R.*, 49

³ *Barrett v. Tewksbury*, 18 Cal. 384; N. Y. 303, 317.

but their propriety has not been finally determined.¹ There does not, however, seem to be any real difficulty in principle. If a wife is clothed with full authority over her own property as though she was unmarried, and if, in pursuance thereof, she is permitted to invoke the aid of judicial proceedings in enforcing contracts against her husband, and in recovering from him the possession of lands and chattels, there can be no valid ground for refusing to her the power of maintaining actions against him for the wrongful taking, detention, or conversion of her chattels, or for injuries done to her property by violence or by negligence. Both classes of actions depend upon the same fundamental rights, — the rights of property which the statute fully confers upon her. If the owner may recover from her husband the very thing itself — the land or chattel — in a *real* action, it is not an enlargement of her power to suffer her to recover the *value* of such things wholly or partially in a *personal* action. The notion that the proceeding must be *equitable* is a remnant of the ancient system which has been abrogated, and is conceived in forgetfulness of the radical changes made by the statutes in the common-law theory of the marriage relation. If the facts constituting the cause of action are stated in the pleading, it is both unnecessary and improper to call the action *equitable*, since the relief, if granted, is the ordinary pecuniary judgment against the defendant personally, and not a judgment *in rem* against his property.

§ 246. The desertion of his wife and family by the husband does not increase her powers and capacities in reference to the bringing and maintaining of judicial proceedings, unless provision is made for such an emergency by express statute. Thus,

¹ In *Owen v. Owen*, 22 Iowa, 270, the wife sued her husband to recover the value of certain United States bonds, her separate property, wrongfully taken by him and converted to his own use. The plaintiff had a verdict and judgment on the trial, but the Supreme Court declined to pass upon the question whether such an action was maintainable. In *Davidson v. Smith*, 20 Iowa, 466, a husband was permitted to recover against the administrator of his deceased wife the amount of certain money belonging to himself which she had unlawfully taken from his possession, and detained until her death, refusing to surrender or return it at his request.

Cole J. said (p. 468), after showing that the money continued to be the property of the husband while in the possession of the wife, and that, when it passed into the possession of her administrator, he might assert his own right to its possession, "which is then for the first time, in contemplation of law, denied," — "If the money was actually converted to her own use, contrary to his will, it was a tort, and not a contract, and such a tort did not make it her own, and *ubi jus ibi remedium*. A proceeding to secure the money to the husband in the lifetime of the wife would necessarily be an equitable one."

after such desertion, the wife cannot maintain an action in her own name to set aside a conveyance of land alleged to have been obtained from him by fraud.¹ In several States, however, the codes contain express provisions, which, in case of desertion by the husband, permit the wife to prosecute and defend such actions as he might have done.²

§ 247. *Third: Equitable Actions.* The grand principle which underlies the doctrine of equity in relation to parties, is, that every judicial controversy should, if possible, be ended in one litigation; that the decree pronounced in the single suit should determine all rights, interests, and claims, should ascertain and define all conflicting relations, and should for ever settle all questions pertaining to the subject-matter. Since the chancery judges were not hampered by the legal dogma that one judgment must be rendered alike for all the plaintiffs and against all the defendants on the record, they were enabled to adopt and enforce such practical rules as would render this principle operative and efficient. In disclosing these rules, and in explaining their application, I am not confined to decisions made by courts professedly governed by the reformed procedure. The codes, as has already been shown, have taken the most general doctrines of equity in relation to parties, have put them into a statutory form, and have made them applicable without exception to all actions. Whether these doctrines have been entirely incorporated into the legal actions under the codes has sometimes been doubted; it is universally admitted, however, that they are operative with their full force and effect in all equitable actions which may be brought in accordance with the new procedure. For the purpose of ascertaining the existing rules which control the selection of parties in equitable actions, we are not, therefore, restricted to those States which have accepted the reform; we may and must extend our inquiry to England and to other States of this country wherever equity exists as a separate division of the municipal law. I shall endeavor, in a very condensed and summary manner, to give the doctrine of parties plaintiff, which has been established by courts of equity and in equitable actions, whether prior or subsequent to the great reform introduced into so many of the States,

¹ *Green v. Lyndes*, 12 Wisc. 404.

² See *supra*, § 236.

and the result will express the law as it now exists in those States.¹

§ 248. It is impossible to lay down with precision many rules in reference to plaintiffs, because equity does not particularly concern itself with determining that such a person shall be a plaintiff and such another a defendant, but rather requires in a more general form that the persons shall be parties, so as to be bound by the decree, and is in general satisfied if they are thus brought before the court either as plaintiffs or as defendants. In other words, the rules of equity seldom declare that a given person or class of persons must be plaintiffs, but simply declare that such person or class must be made parties, if not as plaintiffs, then as defendants.² The result is, that the positive rules as announced by courts and as gathered from a comparison of decisions, are much more full and explicit in reference to defendants than they are in reference to plaintiffs. In actual practice, all persons having an interest in the subject-matter, and therefore either necessary or proper parties, except the actual plaintiff who institutes and prosecutes the suit, are generally made defendants, even though their interests may be concurrent with those of this plaintiff. Still, different individuals holding different rights may be united as plaintiffs in equitable actions; such a joinder is often provided for by well-settled doctrines, and, although their requirement is not peremptory, these doctrines must be discussed and fully stated. The persons that can be made coplaintiffs in an equity suit may be roughly separated into two general classes: (1) Those whose rights, claims, and interests, as against the defendant, are joint, — not necessarily joint in the strict, technical sense of the common law, but in a broader and popular sense, — that is, those whose interests, claims, and rights, whether legal or equitable, are concurrent, arising out of the same events, having the same general nature, and entitled to the same sort of relief. All such persons must be brought before the court as parties, and naturally they should be plaintiffs, and so the rules primarily require; but the requirement is by no means peremptory, and in many and in even the great majority of instances, the equity principle

¹ In this subdivision I have drawn American editor, and have closely followed very largely upon the fourth American that most admirable work. edition of Daniell's Chancery Pleadings, — ² See *Wilkins v. Fry*, 1 Meriv. 244, and the learned notes of Mr. Perkins, the 262.

is satisfied if all but the one who actually sets the cause in motion are placed among the defendants. (2) In the second class are found all those persons who are collaterally interested in the subject-matter of the controversy, whose interests and claims, although antagonistic to the defendant, and to that extent, therefore, in harmony with those of the real plaintiff, are still several and distinct in their nature, arising from different facts and circumstances, and demanding perhaps a different relief. Although the individuals or the class which have been thus vaguely described may be joined as coplaintiffs with the one who is the chief actor in the suit, and although the rules speak of such a joinder as possible, yet in actual practice they are almost invariably placed among the defendants. With this preliminary explanation which modifies the entire doctrine of equity in relation to plaintiffs, I shall proceed to state the general principles which underlie the whole equitable system of parties, and to illustrate the working of these principles in the more important species and varieties of actions by which equitable remedies are conferred.

§ 249. The fundamental principle may be stated as follows : The plaintiff who institutes an equitable action must bring before the court all those persons who have such relations to the subject-matter of the controversy that, in order to prevent further litigation by them, they must be included in and bound by the present decree ; in other words, all those persons who are so related to the controversy and its subject-matter, that, unless thus concluded by the decree, they might set up some future claim, and commence some future litigation growing out of or connected with the same subject-matter, against the defendant who is prosecuted in the present suit, and from whom the relief therein is actually obtained. The principle as thus expressed assumes, what is always true in practice, that in every equitable action there is some person, or group of persons, like a firm or joint tenants, who primarily institutes the proceeding, and demands the relief for his own benefit ; and him, or them, we may designate "the plaintiff ;" and there is also some person or group of persons against whom all the real demands are made, and from whom the substantial remedy sought by the action is asked, — and him we denominate "the defendant." In addition to these two contestants, there are the other individuals described in the foregoing

proposition, who must also be brought before the court and made parties to the controversy either as coplaintiffs or as codefendants. Equity is satisfied in most instances by making them codefendants, and they are generally so treated in actual practice, unless their interests are so identical with those of the plaintiff that they must participate in the substantial relief awarded by the decree. The special subject of our present inquiry may therefore be stated thus: In what cases and under what circumstances are such persons primarily and naturally to be associated as coplaintiffs rather than as codefendants? The answer to this question embodies the principle in its most general form which equity courts have applied in all species of actions to determine the proper joinder of plaintiffs. All those persons whose rights and interests in the subject-matter, and in the relief demanded, are concurrent with the plaintiffs, must be made parties, and naturally will be made coplaintiffs, although it is sufficient in most instances if they are brought into the cause as codefendants. The principle in this very general form is too vague to be of any value as a practical rule, and I shall therefore take up in order the most important classes of cases in which it is applied.

§ 250. The first of the subordinate general principles into which the foregoing vague doctrine may be subdivided, is the following: When the actual plaintiff, as above described, has only an equitable estate, interest, or primary right in the subject-matter of the suit, the person who holds the legal estate, interest, or right therein, should be made a party, and primarily a coplaintiff; for, without such joinder the defendant might be subjected to another litigation from this legal owner or holder of the legal title, a result which equity strives in every way to prevent.¹ One of the most familiar as well as important illustrations of this general principle is the rule which prevails in suits relating to trust property. When property is held in trust, and an action concerning it is brought by the beneficiary or person claiming under the trust, the trustee, or one in whom the legal title is vested, must be made a coplaintiff.² As, for example, when a mortgage has been given to a trustee in trust for certain bene-

¹ 1 Daniell's, p. 192.

land, 1 Paige, 20; *Cassiday v. McDaniel*,

² 1 Daniell's, p. 193. See *Western* 8 B. Mon. 519; *Covington, &c. R. R. v. R. R. v. Nolan*, 48 N. Y. 518; *Malin v. Bowlier's Heirs*, 9 Bush. 468. *Malin*, 2 Johns. Ch. 238; *Fish v. How-*

ficiaries, the trustee and the beneficiaries must unite in a suit to foreclose.¹ The principle applies to all cases where the legal title to sue stands in one, and the beneficial interest in the subject and in the result is held by another; both must unite as plaintiffs. Thus, if a covenant is made with a trustee for the benefit of a *cestui que trust*, both must join in an action to compel a specific performance.² The case of a simple contract, made by an agent, when the agency appears on the face of the agreement, or can be easily established by extrinsic evidence, does not fall within the operation of this rule, for the principal can sue alone and prove the agency if it is disputed. If, however, the agency does not appear in the contract itself, and the principal or person for whom the agreement is made cannot prove it with ease and certainty, then the agent may be made a party so as to bind his interest.³ When an agent acts in any transaction on his own account as well as on account of his principal, so that he has a beneficial interest in the subject-matter, he must be made a coplaintiff with his principal.⁴

§ 251. The case of suits brought by the assignees of things in action is another special example of this general principle. Where a legal thing in action had been assigned, the assignee was permitted to sue in equity for its enforcement in his own name, but the assignor, or his personal representative if he was dead, was an indispensable party, if not as a coplaintiff, then as a defendant; otherwise the debtor might be subjected to a second action at law in the name of the assignor.⁵ This particular rule, however, as has been shown in the preceding sections of the present chapter, has been entirely abrogated in most of the States that

¹ Story Eq. Pl., §§ 201, 209; Wood v. Williams, 4 Mad. 186; Hichens v. Kelly, 2 Sm. & G. 264.

² Story Eq. Pl., § 209; Cope v. Parry, 2 Jac. & Walk. 588. See McCotter v. Lawrence, 6 N. Y. Sup. Ct. 392, 395.

³ 1 Daniell's, p. 196; Botsford v. Burr, 2 Johns. Ch. 409; Bartlett v. Pickersgill, 1 Cox, 15. It should be remembered that when a contract is made by an agent in his own name, expressly for the benefit of another, he is, according to the codes, a trustee of an express trust, and may sue upon it in his own name, without joining the beneficiary as a party. To this extent the new procedure has modified the rule

which prevailed in equity, and which required that both persons should join in bringing the action.

⁴ Small v. Attwood, 1 Younge, 407.

⁵ 1 Daniell's, pp. 197-200, and cases there cited. Where an equitable thing in action, or an equitable interest, was assigned, the assignee could sue alone, since there was no possible danger of an action at law by the assignor. Padwick v. Platt, 11 Beav. 503; Bagshaw v. Eastern Union R. Co., 7 Hare, 114; Blake v. Jones, 3 Anst. 651. There is no difference, under the codes generally, between the assignment of a legal and of an equitable thing in action in respect to the parties.

have adopted the new procedure, since their codes expressly permit the assignee to sue alone without joining the assignor either as a coplaintiff or as a defendant; but it is substantially retained by the codes of Kentucky and of Indiana.

§ 252. In ordinary suits for the administration of the estates of deceased persons brought by creditors, legatees, or distributees, a general personal representative of the estate — an administrator or executor — is indispensable, and is a necessary party, and should properly be made a coplaintiff, although he may be put with the defendants.¹ These ordinary administration suits, which are the common means in England of winding up and settling the estates of decedents, are practically unknown in this country. It is only under some exceptional circumstances that the equity jurisdiction is with us invoked, not to supersede the action of the probate courts, but to aid it, when if left to itself it would fail to afford complete relief and to do complete justice. Whenever such exceptional circumstances exist, and by reason of fraud, collusion, or other similar cause on the part of the executor or administrator, a creditor, or legatee, or distributee of an estate, may and does bring an action on behalf of the estate, even in such a case the personal representative — the administrator or executor — is a necessary party; if he is not united as a coplaintiff, he must be added as a defendant.²

¹ 1 Daniell's, p. 201; Penny v. Watts, 2 Phil. 149, 158; Donald v. Bather, 16 Beav. 28; Croft v. Waterton, 18 Sim. 658.

² Attorney-General v. Wynne, Mos. 126; Wilson v. Moore, 1 My. & K. 126, 142; Saunders v. Druce, 3 Drew. 140. As examples of such actions, see Fisher v. Hubbell, 7 Lans. 481; 65 Barb. 74; 1 N. Y. Sup. Ct. 97; in which the same person was executor of the estates of A. and of B., and the plaintiffs, legatees of A., had claims which placed them in the position of creditors to the estate of B.; and Lancaster v. Gould, 46 Ind. 397, which was an action by legatees and next of kin, against a creditor of the estate and the executor, to set aside a fraudulent allowance and payment of a claim made by the executor to the creditor; and Stronach v. Stronach, 20 Wisc. 129, 138. An administrator having fraudulently assigned and

transferred certain personal property belonging to the estate to a person who was a participant in the fraud, the children of the intestate, who were his only next of kin, united in an action against the administrator and his assignee to set aside the transfer, and for a delivery up of the property to the plaintiffs by the assignee, or for an account of its value and the profits resulting from its use. The action was held to be properly brought. Downer J. said (p. 138): "The administrator cannot avoid his own sale, though he was guilty of fraud in making it. If he dies, or is removed, and an administrator *de bonis non* is appointed, the latter cannot avoid the wrongful sale by the first administrator. This is the rule, except where there are statutory provisions authorizing the administrator *de bonis non* to do what otherwise the creditors, legatees, or distributees alone could do. . . . Cred-

§ 253. In all the foregoing instances the rule has been applied to the holders of a legal and of an equitable estate or interest in the subject-matter; it extends also to all persons having legal demands against the defendant arising out of the same subject-matter or event. Thus, where a lease has been assigned by the lessee, both the lessor and the lessee may each sue the assignee at law for a breach by him of the covenants. In equity, however, neither is permitted to sue the assignee without joining the other also, so that the defendant cannot be subjected to a double action and recovery.¹

§ 254. In the class of cases thus far examined, either an equitable right existed in one person and a legal right in another, or a legal right was held by all. The same principle extends to the very numerous class of cases in which the rights against the defendant arising from the same subject-matter or event are all equitable. Whenever, therefore, in addition to the plaintiff who actually institutes the action, there are other persons having concurrent equitable rights against the defendant growing out of the same subject-matter, they should in general be made parties to the action, primarily no doubt as coplaintiffs, but, if not, then as defendants. The doctrine thus stated in general terms has a very wide application, and upon it are based a very large portion of the special rules as to parties which prevail in equity. It includes not only those who have concurrent rights in the whole subject-matter of the suit, but those also who have similar rights in a part of it, such as joint tenants, who must all be parties in an action concerning the property.² In a suit by joint tenants or tenants in common for a partition, all must be before the court; but it is not necessary of course that all should be plaintiffs.³

itors, legatees, and distributees are the persons who have a right to bring a suit in such a case. As there are no creditors or legatees, the suit was rightfully brought by the next of kin. If the widow is one of the distributees, she ought to be a party." See also *Hills v. Sherwood*, 48 Cal. 886, 392; *Haynes v. Harris*, 38 Iowa, 516, 518-520.

¹ *Daniell's*, pp. 206, 207; *Sainstry v. Grammer*, 2 Eq. Cas. Abr. 165; *City of London v. Richmond*, 2 Vern. 421; 1 Bro. P. C. 518.

² *Daniell's*, pp. 207, 208; *Haycock*

v. Haycock, 2 Ch. Cas. 124; *Weston v. Keighley*, Finch, 82; *Stafford v. City of London*, 1 P. Wms. 428; 1 Stra. 95. Where there are two or more trustees, they must all unite, since their interest is strictly joint. *Thatcher v. Candee*, 38 How. Pr. 145 (N. Y. Ct. of App.).

³ *Anon.*, 8 Swanst. 189; *Brashear v. Macey*, 8 J. J. Marsh. 98; *Braker v. Devereaux*, 8 Paige, 518; *Borah v. Archers*, 7 Dana, 176; *Cornish v. Gest*, 2 Cox, 27. In partition by a tenant in common, his wife is not a necessary coplaintiff; she should be made a party to the action, but

There have been relaxations of this general rule. An action by three out of forty-seven tenants in common, brought to restrain the defendants from quarrying stone upon the land which was owned in common by the whole number, has been sustained, notwithstanding an objection on the ground of the non-joinder was interposed.¹ And where one tenant in common had leased his share for a long period of years, the lessee was permitted to maintain a partition against the other tenants in common, without making the reversioner of his own share — the lessor — a party.² And generally a tenant for life may institute a partition without bringing in the remainder-men.³ When land is held by tenants in common for life, or when there are future contingent interests which may finally vest in persons not yet in being, a partition may be had between those who possess the present estates; but it will only be binding upon the parties who are before the court and those who are virtually represented by such parties.⁴ In an action brought to determine boundaries, all persons interested, whether their estates are present or future, remainder-men and reversioners, must be parties, although of course all need not be plaintiffs.⁵ It is not necessary, as a general rule, to make the actual occupying tenants or lessees parties in suits relating to real property. They must, however, be parties in special cases where they are directly interested and their concurrence is necessary; as, for example, in a partition suit where a tenant in common has leased his share, and in a suit brought to restrain an ejectment which was instituted against the tenants themselves instead of against their lessor.⁶ If, on the other hand, lessees, or any persons holding limited interests, sue to establish some general right, that is, some right belonging to or affecting the whole estate and not merely their own temporary possession and user,

rather as a defendant than as a plaintiff. *Rosekrans v. White*, 7 Lans. 486. The administrator of a deceased tenant in common may, under certain circumstances, be a proper party, together with his heirs, in a partition. *Scott v. Guernsey*, 60 Barb. 163, 181.

¹ *Ackroyd v. Briggs*, 14 W. R. 25.

² *Baring v. Nash*, 1 Ves. & B. 551; *Heaton v. Dearden*, 16 Beav. 147.

³ *Wills v. Slade*, 6 Ves. 498; *Brassey v. Chalmers*, 4 DeG., M. & G. 528.

⁴ *Wotten v. Copeland*, 7 Johns. Ch.

140; *Striker v. Mott*, 2 Paige, 387, 389; *Woodworth v. Campbell*, 5 Paige, 518; *Gaskell v. Gaskell*, 6 Sim. 643.

⁵ 1 Daniell's, p. 209; *Story Eq. Pl.* § 165; *Bayley v. Best*, 1 Russ. & M. 659; *Miller v. Warmington*, 1 Jac. & Walk. 484; *Speer v. Cawter*, 2 Meriv. 410; *Attorney-General v. Stephens*, 1 K. & J. 724; 6 DeG., M. & G. 111; *Pope v. Melone*, 2 A. K. Marsh. 239.

⁶ 1 Daniell's, p. 209; *Story Eq. Pl.* § 151; *Lawley v. Walden*, 3 Swanst. 142; *Poole v. Marsh*, 8 Sim. 528.

the ultimate owners of the inheritance must also be made parties, so that they may be bound by the decree, but the requirement will be satisfied by making them defendants.¹ Thus, where a lessee brought an action to establish a right of way against a person who had erected an obstruction, it was held that his lessor should have been joined as a party to the suit.²

§ 255. The doctrine that persons having or claiming a joint interest or estate must unite, extends to actions which relate to personal property as well as to those which relate to real property.³ The following particular instances will illustrate this application. If a legacy is given to two jointly, both must sue for it; but if legacies are given separately, there being no common interest in any particular one, each legatee may sue for his own.⁴ Where two or more persons are jointly interested in the money secured by a mortgage, that is, according to the law prevailing in this country, when they are joint mortgagees or joint assignees of a mortgage, they must all unite in a foreclosure.⁵ And it is not even necessary that they should be joint holders of the debt secured by the mortgage. All persons who are entitled to share in the proceeds, whether their interest is joint or in common, or several, must be made coplaintiffs, or at least must be brought into the action as defendants.⁶ When, however, the mortgage has been assigned to trustees in trust for the benefit of creditors, the trustees are the only necessary parties plaintiff in a foreclosure suit, and the creditors being represented by them need not be joined.⁷ Actions to foreclose mortgages upon land, and those to enforce and foreclose the vendor's lien upon land for the purchase price thereof, are in all respects based upon the same principles. The equitable doctrine prevailing in by far the

¹ 1 Daniell's, pp. 209, 210.

² Poore v. Clarke, 2 Atk. 515.

³ 1 Daniell's, p. 211.

⁴ Haycock v. Haycock, 2 Ch. Cas. 124; Hughes v. Cookson, 3 Y. & C. 578.

⁵ Story Eq. Pl., § 201; Stucker v. Stucker, 3 J. J. Marsh. 301; Wing v. Davis, 7 Greenl. 81; Noyes v. Sawyer, 8 Vt. 160; Woodward v. Wood, 19 Ala. 218; Palmer v. Earl of Carlisle, 1 S. & S. 423; Lowe v. Morgan, 1 Bro. C. C. 368; Stansfield v. Hobson, 16 Beav. 189. For an example of misjoinder, because there was no community of interest, see Ferris v. Dickerson, 47 Ind. 382.

⁶ Story Eq. Pl., § 201; Goodall v. Mopley, 45 Ind. 355, 358. In this case a mortgage had been executed to several different mortgagees. All but one joined in a foreclosure, and he was afterwards permitted to foreclose for his own behalf, making the other mortgagees, as well as all other persons interested, defendants. See, *per contra*, Montgomerie v. Marquis of Bath, 3 Ves. 560, — a case which has been severely criticised.

⁷ Morley v. Morley, 25 Beav. 263; Thomas v. Dunning, 5 DeG. & S. 618; Knight v. Pocock, 24 Beav. 486.

greater part of the States, and which has entirely displaced the legal notion, regards the debt as the essential fact, and the mortgage as a mere incident thereto. The holder of the mortgage has therefore no estate in the mortgaged premises. Whoever is interested in the debt as one of the creditors, is therefore interested in the mortgage or in the vendor's lien, and, upon the well-settled rules of equity procedure, all must be made parties in order to avoid a division of the claim and a multiplicity of actions. In the western States it is very common, on the sale of land, for the vendor to take the vendee's notes payable at successive dates for the price, and either to receive back a mortgage given to secure such notes, or to rely upon the equitable lien arising from the sale as the security. All the holders of such notes must join as plaintiffs in an action to foreclose, whether the security be a mortgage or the mere vendor's lien.¹ A note and mortgage having been given to a husband and wife as security for money of the wife loaned to the mortgagor, and the husband dying, the wife was held to be the proper party to sue in her own name, either as the surviving promisee and mortgagee, or because the contract concerned her separate estate.²

§ 256. The rule which regulates actions to foreclose, prevails also in those brought to redeem. As all the persons entitled to share in the mortgage debt must unite in a foreclosure suit, so in a suit to redeem, the mortgagor, and all others who have a common right with him to redeem, must be made parties; in strict theory they should be coplaintiffs, but it is sufficient if the one

¹ *Pettibone v. Edwards*, 15 Wisc. 95; *Jenkins v. Smith*, 4 Metc. (Ky.) 380; *Merritt v. Wells*, 18 Ind. 171; *Goodall v. Mopley*, 45 Ind. 355, 358. See, however, *Rankin v. Major*, 9 Iowa, 297. Upon the death of a vendor, it is held, in Kentucky, that his heirs must be joined as plaintiffs in a suit to enforce the lien for purchase-money, that the administrator cannot maintain the action alone. *Anderson v. Sutton*, 2 Duv. 480, 486; *Smith v. West's Executors*, 5 Litt. 48; *Edwards v. Bohannon*, 2 Dana, 98; *Thornton v. Knox's Executors*, 6 B. Mon. 74. This ruling must, I think, be confined to the case of a contract to sell, where the legal title remains in the heirs and they must convey to the vendee. If the land has already been conveyed, the heirs cannot be

necessary parties. As the debt due for the purchase price is a personal asset, it belongs to the personal estate, and falls within the exclusive control of the administrator. Any proceeding to enforce its collection, it would seem, should be instituted by the administrator alone. In North Carolina, the English doctrine as to mortgages still prevails, and, upon the death of the mortgagee, his heirs must, in general, be parties to the foreclosure, although there are some exceptions, as when they are non-residents, and have simply the dry legal title without any beneficial interest, the mortgage having been assigned by the mortgagee. *Etheridge v. Vernoy*, 71 N. C. 184, 185, 187.

² *Shockley v. Shockley*, 20 Ind. 108.

who for his own purposes institutes the action adds the others as defendants.¹ Where a judgment of foreclosure had been obtained on a mortgage, and, with the authority or knowledge of the mortgagee, the sheriff sold the premises in the usual manner, but at a merely nominal price, it was held, in Indiana, that the mortgagor and the mortgagee might unite in an action to set the sale aside, and to redeem the land from the purchaser,—the mortgagor by virtue of his ownership, and the mortgagee by virtue of his interest in having a price produced at the sale large enough to pay his entire claim.² The general doctrine above stated is strictly enforced in redemption suits of all varieties, the underlying principle being that a redemption must be complete and total, that the creditor shall not be compelled to accept a partial payment of his claim, or to make a partial surrender of his securities. When two tracts of land are mortgaged to the same person to secure the same debt, and they afterwards come into the hands of different proprietors, one of them cannot be redeemed without the other; the owners of both the parcels, and all persons interested in them, must be parties to the action, if not all as plaintiffs, then at least as defendants.³ This joinder of the persons interested in the two estates is only necessary, however, while the mortgages are held by the same mortgagee or other holder. If one of them is assigned, or if by any other means they come into the hands of different holders, they being on distinct parcels of land, all connection between them is severed, and the actions to redeem must be separate.⁴ If the action to redeem is brought by an incumbrancer, the same rule applies. In a suit by an incumbrancer, who seeks to redeem from a prior incumbrance, the mortgagor or owner of the land subject to the incumbrances, whatever they may be, is an indispensable party, although not necessarily a plaintiff.⁵ While a second mortgagee, in an

¹ 1 Daniell's, pp. 212, 218; Story Eq. Pl., § 201; Chapman v. Hunt, 1 McCarter, 149; Large v. Van Doren, 1 McCarter, 208.

² Berkshire v. Shultz, 25 Ind. 528. See also McCulloch's Administrator v. Hollingsworth, 27 Ind. 116; Stringfield, v. Graff, 22 Iowa, 488.

³ Story Eq. Pl., §§ 182, 287; Palk v. Lord Clinton, 12 Ves. 48; Lord Cholmondeley v. Lord Clinton, 2 Jac. & W.

1, 184; Ireson v. Denn, 2 Cox, 425; Jones v. Smith, 2 Ves. 372; 6 Ves. 229 (n.); Watts v. Symes, 1 DeG., M. & G. 240; Tassell v. Smith, 2 DeG. & J. 718; Vint v. Padget, 2 DeG. & J. 611; Selby v. Pomfret, 1 J. & H. 386; 8 DeG., F. & J. 595; Bailey v. Myrick, 86 Me. 50.

⁴ Willie v. Lugg, 2 Eden, 78.

⁵ 1 Daniell's, p. 214; Story Eq. Pl., §§ 84, 186, 195; Thomson v. Baskerville, 8 Ch. Rep. 215; Farmer v. Curtis,

action to redeem, must thus bring in the mortgagor or his heir or other owner of the land, he may foreclose the mortgagor and a third mortgagee without joining the first mortgagee as a party, since his proceeding does not in the least affect the rights of such first mortgagee, but its effect is merely to put himself in the place of the mortgagor and of the third mortgagee.¹ This rule may be stated in a more general form. In suits brought to enforce subsequent claims, interests, or incumbrances, on property subject to prior charges which are to be left unaffected, the holders of such prior liens or interests need not be made parties.²

§ 257. The general principle that all persons concurrently interested in the subject-matter of the suit or in its result, whether that relate to real or to personal property, must be parties, is invoked and strictly enforced in all species of actions which are brought to obtain an accounting against the defendant. The remedy of accounting is multiform, and it is often made the basis of some further and ulterior relief, such as rescission and cancellation, redemption, and the like; but wherever an accounting is sought, either for its own sake or as the preliminary step to further judicial action, the rules as to parties are controlling. When several persons are interested in having an account taken, or in its result, one of them cannot be permitted to institute a proceeding for that purpose by himself alone and without joining the others in some manner, so that they shall be bound by the decree, for otherwise the defendant would be exposed to as many actions as there are persons interested, each brought and maintained for the same purpose and upon substantially the same proofs.³ The actions in which an accounting is necessary are very numerous, and arise out of external circumstances very unlike, but, in all of them, the rule as thus stated must be followed in the selection of the parties. Thus in a partnership, or any other like adventure where there is a sharing of profits or

2 Sim. 466; *Hunter v. Macklew*, 5 Hare, 238; *Fell v. Brown*, 2 Bro. C. C. 276; *Palk v. Lord Clinton*, 12 Ves. 48; *Hallock v. Smith*, 4 Johns. Ch. 649.

¹ 1 Daniell's, p. 214; *Story Eq. Pl.*, § 198; *Rose v. Page*, 2 Sim. 471; *Briscoe v. Kenrick*, 1 Coop. temp. Cott. 371; *Arnold v. Bainbrigge*, 2 DeG., F. & J. 92; *Audsley v. Horn*, 26 Beav. 195; 1 DeG., F. & J. 226; *Person v. Merrick*, 5 Wisc.

281; *Wright v. Bundy*, 11 Ind. 398. In England, if the plaintiff in such an action brings in the prior mortgagee, he must offer to redeem his mortgage. *Gordon v. Horsfall*, 5 Moore, 393.

² 1 Daniell's, p. 214; *Rose v. Page*, 2 Sim. 471; *Parker v. Fuller*, 1 R. & M. 656.

³ 1 Daniell's, p. 216; *Petrie v. Petrie*, 7 Lans. 90.

losses, all the persons having shares must be made parties to a suit brought for an accounting.¹ Under the proper circumstances one may sometimes sue on behalf of himself and all the others interested, and it is not indispensable that the individuals having concurrent rights should all be joined as plaintiffs in the action.² If, however, one or more of the parties are non-residents, and beyond the jurisdiction of the court, the rule, under such circumstances, is sometimes relaxed, and the action is allowed to proceed with those parties who are within the reach of the court and its process. The admission of this exception, or of similar ones, is not, however, a matter of absolute right; it depends rather upon the sound discretion of the court regulated by considerations of equity and justice.³ The heirs of a deceased partner must be parties in an action brought to sell real estate of the firm in winding up the partnership and paying the firm debts; although the land is, for the purpose of paying firm debts, treated in equity as a personal asset, yet the legal title of the heir must be divested, and to that end he must be brought in as a party.⁴ On the death of a partner, his personal representative may at once maintain an action against the survivors for an accounting; and when there was no real estate held by the firm as a part of its assets, so that no question can arise as to the title of any lands, the heirs of the deceased are neither necessary nor proper parties to such action.⁵

§ 258. Another example is found in the action by a residuary legatee brought to obtain an account of his share of the residue; he must make all persons interested in the residue parties, even though their interest may be quite remote and contingent.⁶ One residuary legatee may sometimes sue on behalf of

¹ *Ireton v. Lewes*, Finch, 96; *Moffat v. Farquharson*, 2 Bro. C. C. 338.

² *Story Eq. Pl.*, § 166; *Good v. Blewitt*, 13 Ves. 897; *Cullen v. Duke of Queensberry*, 1 Bro. C. C. 101; *Hills v. Nash*, 1 Phila. 594; *Wells v. Strange*, 5 Geo. 22; *Mudgett v. Gager*, 52 Me. 541.

³ The following cases will show to what extent, and under what circumstances, the rule has been relaxed: *Story Eq. Pl.*, § 78; *Darwent v. Walton*, 2 Atk. 510; *Walley v. Walley*, 1 Vern. 487; *Towle v. Pierce*, 12 Metc. 829; *Vose v. Philbrook*, 3 *Story*, 335; *Lawrence v.*

Rokes, 53 Me. 110, 116; *Fuller v. Benjamin*, 28 Me. 255.

⁴ *Pugh v. Currie*, 5 Ala. 446; *Lang v. Waring*, 25 Ala. 625; *Andrews v. Brown*, 21 Ala. 487.

⁵ *Cheeseeman v. Wiggins*, 1 N. Y. Sup. Ct. 595.

⁶ 1 *Daniell's*, pp. 216, 217; *Story Eq. Pl.*, §§ 89, 203, 204; *Parsons v. Neville*, 8 Bro. C. C. 365; *Cockburn v. Thompson*, 16 Ves. 328; *Brown v. Ricketts*, 3 Johns. Ch. 558; *Davoue v. Fanning*, 4 Johns. Ch. 199; *Pritchard v. Hicks*, 1 Paige, 270; *Sheppard v. Starke*, 8 Munf. 29;

all others interested.¹ Also in a suit by next of kin or distributees against the administrator for an account, all of the next of kin or distributees must be parties, naturally as plaintiffs, but if not, then as defendants. This is the established equity rule prior to or independent of any changes made by statutes.² These instances of distributees and residuary legatees thus given are in fact particular cases of a more general rule in reference to actions which have for their object, in whole or in part, an accounting by the defendant, which may be stated as follows: When the persons assert the claim to an account as a portion of a *class* entitled under a general description, all the members of that class, or all the individuals included under that general description, must be before the court; if not among the original parties to the suit, they must be brought in before the final hearing, so that the rights of the entire body can be determined in one decree, and the defendant relieved from the possibility of a multiplicity of actions. Primarily, all these persons being interested in the account adversely to the defendant, they should all be made coplaintiffs; but, as has often been observed, the rules of equity do not demand this strict distinction between plaintiffs and defendants, and they are satisfied if all the individuals, besides the one actually instituting the suit, are placed among the defendants. It is also often possible, when the class is numerous, that one should sue on behalf of all the others. This general rule is

West v. Randall, 2 Mason, 181, 190-199; *Huson v. McKenzie*, Dev. Eq. 468; *Arendell v. Blackwell*, Dev. Eq. 354; *Bethel v. Wilson*, 1 Dev. & Bat. Eq. 610. As illustrations of such remote and contingent interests, see *Sherrit v. Birch*, 3 Bro. C. C. 229 (Perkins's ed., note); *Davies v. Davies*, 11 Eng. L. & Eq. R. 199; *Lenaghan v. Smith*, 2 Phil. 801; *Smith v. Snow*, 8 Mad. 10; *Hares v. Stringer*, 15 Beav. 206; *Grace v. Terrington*, 1 Coll. 8.

¹ *Kettle v. Crary*, 1 Paige, 417, 419, 420; *Ross v. Crary*, 1 Paige, 416; *Hallett v. Hallett*, 2 Paige, 16, 19; *Egberts v. Woods*, 8 Paige, 517.

² 1 Daniell's, pp. 217, 218; Story Eq. Pl., § 89; *Hawkins v. Hawkins*, 1 Hare, 548, 546; *Noland v. Turner*, 5 J. J. Marsh. 179; *West v. Randall*, 2 Mason, 181, 190; *Kellar v. Beelor*, 5 Monr. 573; *Oldham*

v. Collins, 4 J. J. Marsh. 50. See *Petrie v. Petrie*, 7 Lans. 90. Where land and personal property had been conveyed to a trustee upon certain trusts for a beneficiary, and the trustee had died, and all his estate, including the trust-estate, had been distributed to his heirs and next of kin, and the beneficiary had also died, an action was held properly brought by the administrator and heirs-at-law of the latter against the heirs and next of kin of the deceased trustee for an accounting and settlement of the trust, a payment of the personal property, and a conveyance of the land; the administrator was properly made a plaintiff, because he represented the personal estate of the beneficiary; and the heirs, because they succeeded to his real estate. *Richtmyer v. Richtmyer*, 50 Barb. 55.

most comprehensive in its practical application, and must be invoked in a very large number of cases which have little external resemblance; it was well established both in England and in this country as a doctrine of equity procedure, but has of late years been much modified and relaxed in England by statutes.¹

§ 259. There are some exceptions, however, to the foregoing rule which requires all persons interested in the result of an accounting to be made parties. When some of the individuals who were originally interested have been already separately accounted with and paid, they need not be made parties to the suit.² And when the accounts and shares of the different persons have been kept entirely separate and distinct from each other, so that neither one is interested in that of the others, although all relate to the same adventure or undertaking, there need be no joinder of all.³ And where persons are each entitled to a certain fixed portion of an ascertained sum in the hands of a trustee, each may sue for his own share without joining his co-beneficiaries.⁴ The distinction here referred to is important, and should be stated more fully, as follows: If a trustee holds a fund which he is bound to distribute to different beneficiaries in unequal proportions, and the proportionate share of each has not yet been ascertained, all the persons who are interested in the distribution are necessary parties to an action brought to enforce the trust; but where the proportionate share of each beneficiary has been definitively ascertained by a proceeding binding on the trustee, each is entitled to demand payment of the share belonging to himself, and when the payment is withheld he may maintain a separate action for its recovery. The liability of the trustee to each is then exactly the same as though the sum ascertained to belong to him was the only sum which the trustee had received and had been directed to pay.⁵ When a person

¹ See 1 Daniell's, p. 217; Story Eq. Pl. § 90. See Baptist Church v. Presbyterian Church, 18 B. Mon. 685; Hutchinson v. Roberts, 67 N. C. 223.

² D'Wolf v. D'Wolf, 4 R. I. 450; Branch v. Booker, 8 Munf. 48; Moore v. Beauchamp, 5 Dana, 70.

³ Weymouth v. Boyer, 1 Ves. 416; Hills v. Nash, 1 Phil. 594, 597; Brown v. De Tastet, Jac. 284; Bray v. Fromont, 6 Mad. 5.

⁴ 1 Daniell's, p. 219; Story Eq. Pl.,

§§ 207 a, 212; Perry v. Knott, 5 Beav. 298; Smith v. Snow, 3 Mad. 10; Hares v. Stringer, 15 Beav. 206; Lenaghan v. Smith, 2 Phil. 301; Hunt v. Peacock, 6 Hare, 361.

⁵ Gen. Mut. Ins. Co. v. Benson, 5 Duer, 168, 176, per Duer J.; Walker v. Paul, Stanton's (Ky.) code, p. 37. A fund had been devised to a trustee for the benefit of the superannuated preachers of a certain "conference." It was held that the superannuated preachers of that body

jointly interested' in the account is out of the jurisdiction, the cause has sometimes been allowed to go on without him as a party.¹

§ 260. I shall now briefly describe some of the most important special applications of the foregoing general principles in relation to community and concurrence of interests. As a result of these principles, it is a general rule, with but few well-defined exceptions, that trustees cannot alone maintain actions relating to the trust property, but the beneficiaries must also be made parties to the suit in some form, either as coplaintiffs with the trustees or as defendants.² The following are simple illustrations of this general doctrine. Where trustees in trust to sell lands brought an action against the purchaser at their sale to compel a specific performance of their contract of purchase, it was held that the *cestuis que trustent* of the purchase-money must be made parties.³ Again, where the trustees of a numerous unincorporated society brought an action to compel the specific performance of an agreement entered into by themselves for the benefit of the association, it was held that the members of the society should be joined, or, if they were too numerous, then some of them ought to be made coplaintiffs, suing as representatives on behalf of the others.⁴ There are, however, as already stated, certain well-defined exceptions to this general rule requiring trustees and *cestuis que trustent* to be joined in suits concerning the trust property, of which the following are the most important: (1) When trustees appointed to sell lands are expressly authorized by the deed of trust to sell in their own names, and it is further expressly provided in such

might unite in an action to enforce the trust for their own benefit and that of future persons entitled under it. Baptist Church v. Presbyterian Church, 18 B. Mon. 685.

¹ Story Eq. Pl., §§ 78, 89; West v. Randall, 2 Mason, 196; Vose v. Philbrook, 8 Story, 385; Lawrence v. Rokes, 58 Me. 110; Mudgett v. Gager, 52 Me. 541.

² 1 Daniell's, pp. 220-224; Story Eq. Pl., §§ 207, 209; Covington, &c. R. R. v. Bowler's Heirs, 9 Bush, 468; Western R. R. v. Nolan, 48 N. Y. 513; Large v. Van Doren, 1 McCarter, 208; Stilwell v. McNeely, 1 Green Ch. 305; Van Doren v. Robinson, 1 C. E. Green, 256; Malin v. Malin, 2 Johns. Ch. 238; Fish v. How-

land, 1 Paige, 20; Schenck v. Ellingwood, 8 Edw. Ch. 175; Helm v. Hardin, 2 B. Mon. 232; Burney v. Spear, 17 Geo. 223; Woodward v. Wood, 19 Ala. 213; Kirk v. Clark, Prec. Cha. 275; Phillipeon v. Gatty, 6 Hare, 26. Where two or more trustees have been appointed, they must all unite in actions brought by them, as their right is strictly joint; and this rule applies, although some one of them may have attempted, by assignment or otherwise, to divest himself of the trust. Thatcher v. Candee, 33 How. Pr. 145 (N. Y. Ct. of App.).

³ Calverley v. Phelps, 6 Mad. 229.

⁴ Douglas v. Horsfall, 2 S. & S. 184.

deed that their own receipt of the price shall be a complete discharge to the purchaser, it is settled that they may maintain a suit to compel a specific performance against the purchaser without joining the *cestuis que trustent* with themselves as parties.¹

(2) In some special instances, where the interest of the beneficiaries was simply collateral to the rights of the trustee against the defendant, the trustee has been permitted to sue alone.²

(3) And in suits between the trustees themselves, brought by one to compel the other to account for and restore trust property misappropriated by him, the beneficiaries need not be made parties.³ But if the *cestuis que trustent* have concurred in the breach of trust, they must be joined in the suit brought by one trustee against his co-trustee to repair the fault.⁴

§ 261. (4) The most important exception by far, as well as the most familiar one, is the case of executors and administrators; they can always sue alone, without joining the legatees, distributees, creditors, or other persons interested in the estate, as parties either plaintiff or defendant. The legal title to the personalty is so completely vested in the executors and administrators, that, both in law and in equity, they are considered as fully representing the rights and interests of all the other persons who have ultimate claims upon such estate as legatees, distributees, or creditors. In all actions, therefore, relating to the estate, they sue alone. This rule is fully established in equity as well as at law.⁵ All the acting executors or administrators must join; ⁶ but if a portion only have proved, the others need not be made parties, although they may not have formally renounced.⁷ It is not indispensable, how-

¹ See 1 Daniell's, pp. 221, 222, and cases cited.

² As, for example, in *Saville v. Tancred*, 1 Ves. Sen. 101; 3 Swanst. 141; *Story Eq. Pl.*, § 221.

³ *Story Eq. Pl.*, § 218; *Franco v. Franco*, 3 Ves. 77; *Bridget v. Hames*, 1 Coll. 72; *May v. Selby*, 1 Y. & C. 285; *Horsley v. Fawcett*, 11 Beav. 565; *Peake v. Ledger*, 8 Hare, 818; 4 De G. & S. 187; *Baynard v. Woolley*, 20 Beav. 588; *Allen v. Knight*, 5 Hare, 272, 277; *Cunningham v. Pell*, 5 Paige, 607. But see *Chancellor v. Morecraft*, 11 Beav. 262.

⁴ *Jesse v. Bennett*, 6 De G., M. & G. 809.

⁵ 1 Daniell's, p. 224; *Jones v. Goodchild*, 3 P. Wms. 88; *Peake v. Ledger*, 8

Hare, 818; *Smith v. Bolden*, 38 Beav. 262. It has been held that an administrator, suing in equity to recover assets of the estate, may join the distributees as coplaintiffs; that such uniting of parties, though not at all necessary, is not improper. *Richardson's Administrator v. Spencer*, 18 B. Mon. 450. An administrator may maintain an action to set aside transfers of his intestate in fraud of creditors, since he represents the creditors as well as the deceased. *Cooley v. Brown*, 30 Iowa, 470, 473, 474.

⁶ 1 Daniell's, p. 226; *Offley v. Jenney*, 3 Ch. Rep. 92; *Cramer v. Morton*, 2 Molloy, 108.

⁷ *Davies v. Williams*, 1 Sim. 5; *Dyson v. Morris*, 1 Hare, 418; *Rinehart v. Rine-*

ever, that all the executors or administrators should be plaintiffs; for it is enough in equity if all the parties are before the court, so that one executor or administrator may sue as plaintiff, if he make his co-executor or co-administrator a defendant.¹ When a residuary legatee sues for his share of the residue, all the other residuary legatees must be joined either as plaintiffs or defendants.² And in a suit for distribution, all the distributees must be brought in as parties, primarily as plaintiffs, but at all events as defendants.³ Where legacies are charged upon real estate, the executors alone are not sufficient parties; but all the other legatees must be brought in, so that the assets may be marshalled, and the respective rights of all may be determined.⁴ (5) Another important exception to the rule requiring the union of beneficiaries and trustees in suits relating to the trust property is the case of assignees in trust for creditors, and the assignees in bankruptcy or insolvency. These particular trustees, as well as executors and administrators, may always sue and defend alone in such actions, without joining with themselves the creditors whom they represent as *cestuis que trustent*.⁵ Nor need the assigning debtor, bankrupt, or insolvent be made a party.⁶

§ 262. The principle which requires all persons claiming interests in the subject-matter concurrent with the plaintiff who institutes the suit to be made parties, is applicable in general to those having future and expectant interests, as well as to those whose interests are present, and whether they are in possession, remainder, or reversion. It is the established doctrine of equity that when a person claims an estate, either under a will or a deed by which successive estates or interests have been created, all the

hart, 2 McCarter, 44; Marsh v. Oliver, 1 McCarter, 262. But an executor who has not proved the will may, nevertheless, be a necessary defendant in a suit brought to carry its trusts into effect. Ferguson v. Ferguson, 1 Hayes & J. 800; Yates v. Compton, 2 P. Wms. 808; Cramer v. Morton, 2 Moll. 108; Thompson v. Graham, 1 Paige, 884.

¹ Wilkins v. Fry, 1 Meriv. 244, 262; Blount v. Burrow, 8 Bro. C. C. 90; Dare v. Allen, 1 Green Ch. 288.

² 1 Daniell's, p. 225; Harvey v. Harvey, 4 Beav. 215, 220; Smart v. Bradstock, 7 Beav. 500; Bateman v. Margerison, 6 Hare, 496, 499; Doody v. Higgins,

9 Hare, App. 82, 88; Gould v. Hayes, 19 Ala. 438.

³ Hawkins v. Craig, 1 B. Mon. 27; Osborne v. Taylor, 12 Gratt. 117. But see Keeler v. Keeler, 8 Stockt. 458; Moore v. Gleaton, 28 Geo. 142.

⁴ Morse v. Sadler, 1 Cox, 352; Hallett v. Hallett, 2 Paige, 15; Howland v. Fish, 1 Paige, 20; Todd v. Sterrett, 6 J. J. Marsh. 482.

⁵ 1 Daniell's, p. 224; Spragg v. Binkes, 5 Ves. 587.

⁶ De Golls v. Ward, 8 P. Wms. 811 (n.); Kaye v. Fosbrooke, 8 Sim. 28; Dyson v. Hornby, 7 DeG., M. & G. 1.

other persons claiming under the same will or deed, down to the one who is entitled to the first vested estate of inheritance, must be joined in the action as parties, either as coplaintiffs or as defendants. To illustrate by a simple example: If, by a deed, land has been given to A. for years, with remainder to B. for life, and remainder to C. in fee, and A. is in possession as the tenant for years, B. cannot alone maintain an action against A. to restrain the commission of waste; but C., the remainder-man in fee, must also be brought in as a party, naturally as a coplaintiff, but if not, then as a defendant, so that he may be before the court representing the ultimate ownership. All those entitled to intermediate estates prior to the first vested inheritance must also be joined, so that the entire ownership may be brought before the court, and may be bound by its decree.¹

§ 263. In actions to compel the specific performance of contracts, the immediate parties to the agreement are, as a general rule, the only necessary parties to the suit; but this includes, of course, those who by substitution become clothed with the rights or duties of the original contractors, as heirs, devisees, or sometimes the personal representatives.² If a tract of land is sold in separate parcels to different purchasers, the latter cannot unite in an action for a specific performance against the vendor, since each sale is distinct, and depends upon its own circumstances. But if there is only one contract of sale to several persons covering the land in question, although it may have stipulated for different shares, the purchasers may unite; it is not necessary that the vendees should be jointly interested in the purchase, in the legal import of that term, it is enough if they have common or concurrent interests in the subject-matter.³ If the vendee in a land contract dies, his heirs are the parties to bring an action for a specific performance; but his administrator, when the suit is

¹ 1 Daniell's, pp. 227-230; Story Eq. Pl., § 144; Finch v. Finch, 2 Ves. Sen. 492; Molineux v. Powell, 3 P. Wms. 268 (n.); Herring v. Yoe, 1 Atk. 290; Pyncent v. Pyncent, 3 Atk. 571; Sohler v. Williams, 1 Curtis, 479.

² 1 Daniell's, p. 230; Tasker v. Small, 3 My. & Cr. 63, 69; Wood v. White, 4 My. & Cr. 460; Robertson v. Gr. West. R. Co., 10 Sim. 314; Humphreys v. Hollis, Jac. 73; Paterson v. Long, 5 Beav. 186; Peacock v. Penson, 11 Beav. 355; Petre

v. Duncombe, 7 Hare, 24; De Hoghton v. Money, L. R. 2 Ch. App. 164, 170; Bishop of Winchester v. Mid Hants R. Co., L. R. 5 Eq. 17; Aberaman Iron Co. v. Wickens, L. R. 4 Ch. App. 101; Fenwick v. Bulman, L. R. 9 Eq. 165; Daking v. Whimper, 26 Beav. 568; Morgan v. Morgan, 2 Wheat. 290; Lord v. Underdunk, 1 Sandf. Ch. 46; Hoover v. Donally, 3 Hen. & Mun. 316. See McCotter v. Lawrence, 6 N. Y. Sup. Ct. 892, 895.

³ Owen v. Frink, 24 Cal. 171, 177.

simply to recover damages.¹ It follows, from the general rule given above, that a mere stranger claiming an interest or estate under an adverse title is neither a necessary nor a proper party to the suit for a specific performance; his rights cannot be affected by the decree made therein, and must, in fact, be determined in another and distinct proceeding.² But a person claiming under a prior agreement is not such a mere stranger, and he is a proper party in an action brought by the vendee to compel a specific performance, and to determine the right to the purchase-money.³ Another person than the vendor may also be so interested in the subject-matter of the contract, that his presence or aid will be needed in order to make out a complete title; and, when this is the case, such person may also be joined as a party to the suit for a specific performance, although not an actual party to the contract sought to be enforced.⁴ Also, when a third person has, after the making of the contract, acquired some interest in the subject-matter under the vendor, but with notice of the vendee's rights, he may be brought in as a codefendant with the vendor in the suit for a specific performance.⁵

§ 264. It was a well established doctrine of equitable procedure, that, in suits to carry into effect and enforce the trusts of a will, the heirs-at-law must be made parties. This rule has, however, been greatly modified, if not actually abrogated, in England by recent statutory legislation; and in the United States it is not often invoked because such suits are comparatively infrequent.⁶ Where, on the other hand, an action is brought to set aside a will, then all the devisees are necessary parties, and the executor, unless he has renounced;⁷ and all the legatees residuary and other.⁸

¹ Webster v. Tibbitts, 19 Wisc. 488; Peters v. Jones, 35 Iowa, 512, 518.

² Tasker v. Small, 3 My. & Cr. 68, 69; De Hoghton v. Money, L. R. 2 Ch. App. 164, 170.

³ West Midland R. Co. v. Nixon, 1 H. & M. 176; Chadwick v. Maden, 9 Hare, 188.

⁴ Wood v. White, 4 M. & C. 460, 488; Chadwick v. Maden, 9 Hare, 188; Cope v. Parry, 2 Jac. & W. 588; McCotter v. Lawrence, 6 N. Y. Sup. Ct. 892, 895; Story Eq. Pl., § 209.

⁵ Spence v. Hogg, 1 Coll. 225; Collett v. Hover, 1 Coll. 227; Cutts v. Thodey,

18 Sim. 206; Leuty v. Hillas, 2 DeG. & J. 110. See Carter v. Mills, 30 Mo. 432.

This rule, given in the text, must be applied under a great variety of external circumstances, and is exceedingly comprehensive in its operation.

⁶ See, on the subject of the heirs being parties, and of the statutory changes in England, 1 Daniell's, pp. 231, 232; Story Eq. Pl., § 163.

⁷ Vancleave v. Beam, 2 Dana, 155; Hunt v. Acre, 28 Ala. 580; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190.

⁸ McMaken v. McMaken, 18 Ala. 576.

§ 265. The broad principle which underlies most of the foregoing special rules is, that when an action is instituted by some determinate individual for his own benefit, whom we call *the plaintiff*, all persons having interests or claims against the defendant, in relation to the subject-matter, concurrent with his, must be brought in as parties; if they do not wish to unite as coplaintiffs, they must be added as defendants. The connecting link is the *concurrence* of the interests. If this element is wanting, the principle itself is not operative. It follows, therefore, as a general principle,—the converse of that already discussed,—that when a suit is instituted by some determinate individual, whom we call the plaintiff, and there are other persons asserting claims against the defendant, even in respect to the same subject-matter, but such claims are set up under titles antagonistic to, or inconsistent with, that of the plaintiff, these persons should not be made parties to the action either as plaintiffs or as defendants, since the indispensable element of concurrence in their interests is wanting, so that if they were joined as parties, two distinct controversies at least would be carried on in the single litigation.¹ Among the examples of such improper union of persons whose interests are antagonistic is the case of an action to redeem brought by an heir-at-law and a devisee under a will; the joinder is improper, since one or the other of these parties has, of course, no right to redeem in the case supposed.² And a person liable to account to the other plaintiffs cannot be joined as a coplaintiff.³ This objection, based upon the inconsistency of rights and interests, does not apply, however, to causes in which a single plaintiff unites in himself two or more conflicting claims or interests.⁴

§ 266. Because claims, titles, and interests are distinct, and, in a certain sense, independent of each other, they are not therefore necessarily antagonistic or inconsistent; and persons having such distinct claims and interests, which are not antagonistic or inconsistent, may often be united in an action of which the object is

¹ See 1 Daniell's, pp. 229, 230-233.

² Lord Cholmondeley v. Lord Clinton, 2 Jac. & W. 1, 185; 4 Bligh, 1; s. c. T. & R. 107, 115; Fulham v. McCarthy, 1 H. L. Cases, 703; Saumarez v. Saumarez, 4 M. & C. 336; Robertson v. Southgate, 6 Hare, 536; Bill v. Cureton, 2 M. & K. 603; Jopp v. Wood, 2 DeG., J. & S. 323; Griggs v. Staplee, 2 DeG. & S. 572; New-

comb v. Horton, 18 Wisc. 566; Gates v. Boomer, 17 Wisc. 455; Crocker v. Craig, 46 Me. 327; Fletcher v. Holmes, 40 Me. 364.

³ Jacob v. Lucas, 1 Beav. 436, 443; Griffith v. Vanheythuysen, 9 Hare, 85.

⁴ Miles v. Durnford, 2 DeG., M. & G. 641; Carter v. Sanders, 2 Drew, 248; Foulkes v. Davies, L. R. 7 Eq. 42.

their common benefit. In applying this principle, there is some diversity of opinion, and even conflict among the decided cases. In certain classes of actions the doctrine is well settled, and the joinder of such persons is a matter of common practice. In other classes of suits the courts have not been so unanimous; sometimes they have yielded to the general tendency of equity, which seeks to determine all disputes concerning the same subject-matter in one litigation, and have therefore permitted the union; at other times they have been controlled by the fact that there was no real legal community of interest among the parties, and have refused to allow the attempted joinder. As it will be impossible to deduce any general rule covering all such instances, I shall first mention and illustrate those classes of causes in which the doctrine has been established, and shall in the second place collect some examples of other classes in which there is no such unanimity of judicial decision. The most familiar and important case of persons having distinct but not conflicting interests, and in respect of whom the rule concerning their joinder as parties is well settled, is that of creditors. There are several species of actions brought by creditors, in which the various creditors of a single debtor may all unite as plaintiffs. Thus, the creditors of a deceased debtor may all join in the same administration suit brought to settle his estate, and to administer its assets; but this species of action is quite uncommon in the United States.¹ Such union, however, is not necessary; one may sue alone if he choose;² and when the number is great, one may sue on behalf of all the others.

§ 267. The most common and important action by creditors, to which the rule may be applied, is the creditor's suit, or an action in the nature of a creditor's suit. A single judgment creditor may alone maintain an action to enforce the payment of his judgment, to reach equitable assets, to set aside fraudulent transfers by his debtor and thus let in the lien of his judgment, and for other similar relief; and the other judgment creditors need not necessarily be joined, either as plaintiffs or as defendants. On the other hand, two or more of the judgment creditors, or all of them together, may unite in bringing such an action, or finally, one

¹ 1 Daniell's, p. 285; *Cosby v. Wickliffe*, 7 B. Mon. 120; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Cheshire Iron Works v. Gay*, 3 Gray, 581, 584, 585.

² *Anon.*, 8 Atk. 572; *Peacock v. Monk*, 1 Ves. 127, 131. See *Hills v. Sherwood*, 48 Cal. 886, 392.

may sue on behalf of himself, and all others who are in the same position.¹ Since all the creditors have the same kind of interest in the common fund — the assets of the debtor, and since a receiver is frequently appointed over that fund, the utmost latitude is permitted in respect to the union of different creditors as complainants. One may maintain the action alone, or may sue on behalf of himself and of all the others similarly situated, or all may join, or any number less than all may at their election institute the action. Such an action may also be brought by a receiver of the debtor's property, appointed in proceedings supplementary to execution, and he may either sue alone, or the judgment creditors, or some of them, may join with him.²

§ 268. Where an assignment has been made in trust for creditors, one of the creditor beneficiaries cannot maintain an action to enforce the trust, to compel an accounting by the assignee, and to procure a settlement and distribution of the trust estate. All the creditors must unite in bringing such an action, either actually or by representation; for where the number of such creditors is great, one or more have been permitted to sue on behalf of themselves and all the others.³ The rule thus stated in respect of creditors is simply a special case of the general doctrine applicable to every species of trust. In actions based upon the trust,

¹ *Bartlett v. Drew*, 57 N. Y. 587, 588, 589; *Clarkson v. De Peyster*, 3 Paige, 320; *Farmelee v. Egan*, 7 Paige, 610; *Grosvenor v. Allen*, 9 Paige, 74; *Farnham v. Campbell*, 10 Paige, 598; *Way v. Bragaw*, 1 C. E. Green, 218, 216; *Edgell v. Haywood*, 3 Atk. 357. See, especially, *Conro v. Port Henry Iron Co.*, 12 Barb. 27, 57-60, per Willard J., for a full discussion of the subject and an exhaustive citation of authorities. When the debtor is dead, a judgment creditor may bring an action to set aside a fraudulent transfer made by him. *Hills v. Sherwood*, 48 Cal. 386, 392. An attaching creditor merely cannot maintain the action. *Weil v. Lankins*, 3 Neb. 384, 386.

² See cases cited in last preceding note; also, *Hamlin v. Wright*, 28 Wisc. 491; *Gates v. Boomer*, 17 Wisc. 455, 458; *Ruffing v. Tilton*, 12 Ind. 259; *Burton v. Anderson*, *Stanton's (Ky.) code*, p. 34; *Baker v. Bartol*, 6 Cal. 483. In *Hamlin v. Wright*, Paine J. said: "The question

whether the complaint is multifarious should be determined according to the established rules upon that subject in respect to creditors' bills; and, in respect to them, it has been determined that different judgment creditors may join in one suit against the judgment debtor and his fraudulent grantees." In *Gates v. Boomer*, Cole J. said: "Both plaintiffs have a common interest in removing the fraudulent conveyance, so that they can enforce their respective judgments. Aside from our statute, we think there would have been no misjoinder of parties; but the provision of the statute [the code] is unquestionably broad enough to meet the case, since both plaintiffs have a direct and common interest."

³ *Story Eq. Pl.*, §§ 150, 207; *Bainbridge v. Burton*, 2 Beav. 589. In *Harrison v. Stewardson*, 2 Hare, 580, twenty creditors was held to be too small a number to allow a suit by representation.

recognizing its existence and validity, and seeking to carry out its terms and provisions, all the persons interested must be parties; all the beneficiaries must therefore unite in an action against the trustee brought to obtain an accounting, and a winding up and settlement of the estate, or, in technical phraseology, an action brought to administer the trust.¹ While the beneficiaries as a class must all unite, either actually or through a representative plaintiff, in actions based upon the trust as existing, and brought to administer it, one person who would be a beneficiary may, without joining any others, maintain a suit which is based upon a denial of the trust and seeks to overthrow it, and to set aside the instruments which created it, and the acts of the trustee done under it. Thus, for example, any judgment creditor may bring an action in his own name to set aside an assignment in trust for himself and the other creditors.²

§ 269. From the cases of creditors and *cestuis que trustent*, in respect of whom the rule is well settled, I now pass to other classes of persons having distinct, though not conflicting interests and claims, and I collect a number of decisions which show the tendency of the courts in dealing with them. Owners of entirely distinct and separate parcels of land, although no community of right or interest existed among them, have been permitted to unite in equitable actions based upon their individual separate

¹ *De la Vergne v. Evertson*, 1 Paige, 181; *Greene v. Sisson*, 2 Curtis, 171; *Hawkins v. Craig*, 1 B. Mon. 27; *Elam v. Garrard*, 25 Geo. 557; *High v. Worley*, 32 Ala. 709; *Gould v. Hayes*, 19 Ala. 488; *Keeler v. Keeler*, 3 Stockt. 458; *Case v. Carroll*, 85 N. Y. 385; *Sortore v. Scott*, 6 Lans. 271, 275; *Munch v. Cockerell*, 8 Sim. 219, 231. See *French v. Gifford*, 80 Iowa, 148, 158, 159.

² In *Hubbell v. Medbury*, 53 N. Y. 98, where an assignment had been made for the benefit of creditors, a *cestui que trust* under it and the assignor brought an action to set aside a wrongful purchase of the trust property by the assignee; the action was sustained, and it was held that a substituted trustee as the plaintiff was unnecessary. When a trustee is guilty of misconduct in his trust, by misapplying the assets, or converting the same to his own use, a single *cestui que trust* is per-

mitted by a special statute, in Minnesota, to maintain an action for an account, and to enforce the trust, and to remove the trustee. This statute is general in its terms, and applies to all trustees and trusts. "Upon petition or bill of any person interested in the execution of an express trust, the Court of Chancery may remove any trustee who shall have violated, or threatened to violate, his trust." Compiled Stat. of Minn., p. 384, § 26; *Goncelier v. Foret*, 4 Minn. 18. See *French v. Gifford*, 80 Iowa, 148, 158, 159. In the case of a charitable trust, any beneficiary having an interest in the use or in the subject of the gift, has an unquestionable right to institute a proceeding in equity for the purpose of securing a faithful execution of the beneficent object of the founder of the charity. *Baptist Church v. Presbyterian Church*, 18 B. Mon. 635, 641.

property, simply because the wrong to be remedied or prevented was a single act, and affected all of them and all of their lands in the same manner. Thus, owners of separate tenements have been allowed to join in an action brought to restrain and remove a nuisance which was common to all.¹ Two or more owners of separate lots assessed for a local street improvement, when the assessment is claimed for the same reason to be invalid as to all, may unite in an action to restrain the collection; and when the number of such owners is great, one may sue as a representative for all the others.² Also a number of proprietors of adjacent and separate lots fronting on a street through which a railroad was laid out, were permitted to join in a suit for the purpose of preventing the company from constructing its track in such a manner as to interfere with access to all of their several lots alike.³ The question as to the joinder of plaintiffs who own distinct parcels of land, or who are clothed with distinct primary rights of the same kind, which are all interfered with and affected in the same manner by a common wrong, has frequently arisen in actions brought by tax-payers and freeholders to prevent or set aside some proceeding done under the forms of public authority, and which is designed to create and impose a public burden, such as a tax for

¹ *Peck v. Elder*, 8 Sandf. 126. But six owners of distinct tracts of land through which a stream ran were not permitted to join in an action to restrain another riparian owner from diverting the water. *Schultz v. Winter*, 7 Nev. 180. See, *per contra*, *Foot v. Bronson*, 4 Lans. 47, 52, in which such a union of different owners was held proper; citing *Reid v. Gifford*, *Hopk.* 416; *Murray v. Hay*, 1 Barb. Ch. 59; *Brady v. Weeks*, 8 Barb. 157.

² *Upton v. Oviatt*, 24 Ohio St. 282, 247; *Glenn v. Waddell*, 28 Ohio St. 605.

³ *Tate v. Ohio & Miss. R. R.*, 10 Ind. 174. The company had raised an embankment and trestle-work in such a manner as to cut off access to the lots owned by the eleven plaintiffs. The prayer was that the company be compelled to change or to remove its structure. On demurrer by the defendant, the court, per *Davison J.*, said: "The only question is, had the plaintiffs a right to join in the action?" Quoting the provisions of the code in relation to parties, he declares that they

substantially re-enact the equity rule, and adds: "All who are united in interest must join in the suit, unless they are so numerous as to render it impracticable to bring them all before the court; while those who have only a common or general interest in the controversy may, one or more of them, institute an action. This, however, must not be understood as allowing in all cases two or more persons having separate causes of action against the same defendant, though arising out of the same transaction, to unite and pursue their remedies in one action. Several plaintiffs in one complaint cannot demand several matters of relief which are plainly distinct and unconnected. But when one general right is claimed, when there is one common interest among the plaintiffs centring in the point in issue in the cause, the objection of improper parties cannot be maintained. . . . These plaintiffs, though not united in interest with each other, claim one general right to be relieved from a nuisance which alike affects all of them."

special objects, an assessment for some local improvement, a municipal bonding in aid of some *quasi* public enterprise, and numerous other like proceedings which create a public or municipal debt. Such actions are permitted, and are freely used in **most of the States, although not allowed in New York and a few others.** Where suits of this character are sustained by the courts, the question has arisen, whether two or more tax-payers having distinct freeholds, or distinct pieces of property subject to the burden, and who have no connection except in the common wrong and in the like relief demanded by all, may unite in the action, or whether one may sue on behalf of all, or finally, whether each must bring a separate suit to free his own property from the wrongful incumbrance. It would seem, upon the principle of the decision last quoted, that such a joinder was not only proper, but was in every way expedient; but the cases have not been unanimous upon the point, and some of them have distinctly pronounced against a joint proceeding. In Wisconsin, where a number of freeholders, owning distinct lots of land, and having no connection except that they were all residents of the municipality, and whose personal property had been levied upon for the tax, and advertised for sale, united in an action to set aside the entire proceedings of the local authorities, and to procure the tax and all steps taken in relation to it to be declared void, and to restrain the sale of their property, it was held that these plaintiffs could not join in a suit merely to prevent the sale of their property because their interests were entirely several; but that they could unite in an action to avoid and set aside the proceedings of the municipal authorities, and that the court having thus acquired jurisdiction, could go on and administer complete relief.¹ In another case, two plaintiffs owning distinct lots in severalty, and suing on behalf of all other tax-payers of the city, brought an action to set aside a local assessment and tax made and levied by the city authorities, and to restrain the sale of their lots. It was held that they could not maintain the joint action. The court said, if the tax was illegal there was an apparent cloud upon each lot, and each plaintiff was interested only in removing this cloud from his own land; each and all might be interested in the legal question involved in the suit; for if one had a right to remove the

¹ Peck v. School District No. 4, 21 Wisc. 516.

cloud and to enjoin the assessment as illegal, for the same reasons and upon the same evidence, each of the others might obtain relief; but there was no such common pecuniary interest as authorized them to unite in one suit and obtain the relief demanded; each could sue alone, and the others were not necessary parties; this was not an action respecting a common fund, nor to assert a common right, nor to restrain acts injurious to property in which all the plaintiffs had a common interest.¹ In Ohio, two or more owners of separate lots assessed for a local improvement may unite in an action to restrain the enforcement and collection, when the tax is claimed for the same reason to be invalid as to all.² In Kansas a distinction is made depending upon the nature of the tax itself. If the tax is wholly illegal, that is, illegal as applied to all persons and property, — as, for example, a tax to pay the interest on illegal bonds, — any number of taxpayers may unite in the action.³ If, however, the tax is valid as a tax, — as, for example, the ordinary county or State tax, — and becomes illegal for some cause only as it applies to certain persons or property, then each person severally interested as the owner of distinct and separate lots of land must sue alone; there can be no joinder by tax-payers who have no common property.⁴ In Iowa it has been recently held that tax-payers owning separate property cannot unite, nor can one sue on behalf of all others similarly situated, in an action to restrain the enforcement and collection of an illegal tax, but each must bring an action for himself.⁵

§ 270. A few other miscellaneous cases of distinct interests may be mentioned. When several persons have simultaneous but entirely separate mechanic's liens upon the premises of the same person for work done and materials furnished by them, they cannot all, nor can any two or more of them unite in an action brought to enforce and foreclose such liens under the statute.⁶ Under the

¹ *Barnes v. City of Beloit*, 19 Wisc. 98, 94, per Downer J. It is impossible to reconcile the reasoning in these two cases, nor the conclusions which they reach. See also *Newcomb v. Horton*, 18 Wisc. 556, which maintains the same doctrine as *Barnes v. Beloit*.

² *Upton v. Oviatt*, 24 Ohio St. 232, 247; *Glenn v. Waddell*, 23 Ohio St. 605.

³ *Bridge Co. v. Wyandotte*, 10 Kans.

826; *Gilmore v. Norton*, 10 Kans. 491; *Gilmore v. Fox*, 10 Kans. 509.

⁴ *Hudson v. Commissioners, &c.*, 12 Kans. 140, 146, 147.

⁵ *Fleming v. Mershon*, 86 Iowa, 418, 416-420. The question was carefully examined with a reference to numerous decisions of equity courts. Cole J. dissented in a very able opinion containing a review of all the authorities, pp. 421-427.

⁶ *Harsh v. Morgan*, 1 Kans. 293, 298.

construction given to statutes of Ohio, making the shareholders in corporations liable in certain contingencies to the creditors of the companies, it is held that a suit should be brought by or for all the creditors who come within the conditions; that is, all these creditors should actually be made plaintiffs, or the action should be in the name of one for the benefit of all.¹

SECTION SEVENTH.

WHO MAY BE JOINED AS DEFENDANTS.

§ 271. The sections of the various State codes and practice acts which prescribe rules for the proper selection of defendants are as follows: one of them is found in all the statutes, and expresses the doctrine in its general form. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination, or settlement of the questions involved therein."² To this general declaration there is added in a few States the following particular clause: "And in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants, and any person claiming title or a right of possession to real estate may be made a party plaintiff or defendant, as the case may require, to any such action."³ The codes also all contain the following provisions, either embraced in a single section or separated into two, namely: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint [or petition]. [And] When the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend

¹ *Umsted v. Buskirk*, 17 Ohio St. 118. Nevada, § 18; Oregon, § 380, but applied

² New York, § 118; Ohio, § 35; Indiana, § 18; Kansas, § 86; California, § 879; Washington, § 14; Idaho, § 18; Wyoming, § 41; Montana, § 18.
³ New York, § 118; South Carolina, § 141; North Carolina, § 61; California, § 879.

for the benefit of the whole.”¹ Finally, a section is found in every code particularly referring to the case of persons severally liable on the same instrument, of which the ordinary form is as follows: “Persons severally [and immediately, *Indiana*] liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff.”²

§ 272. The subject-matter of the present section is the interpretation of the general clauses of the statute quoted above, — the doctrine of parties defendant in its general scope and import, — the general rules which prescribe the choice and direct the joinder of defendants in civil actions of all kinds, whether legal or equitable. The special cases described in the other clauses of the statute, — namely, that of one person suing or being sued as the representative of others, and that of persons severally liable upon the same instrument, — will be separately discussed in the two sections which follow the present one. The doctrine of parties, and especially of parties defendant, in its entirety, is intimately connected with that of judgments, and cannot be exhaustively treated, without a discussion also of the latter topic. Many im-

¹ These provisions are thus found as a single section in New York, § 119; Indiana, § 19; California, § 382; Wisconsin, ch. 123, § 20; Florida, § 70; South Carolina, § 142; North Carolina, § 62; Nevada, § 14; Oregon, § 381; Dacotah, § 72; Washington, §§ 14, 15; Idaho, § 14; Wyoming, § 42; Montana, § 14. In the following States they are separated into two sections, corresponding to the two paragraphs of the text: Ohio, §§ 36, 37; Kansas, §§ 37, 38; Iowa, §§ 2548, 2549; Nebraska, §§ 42, 43; Kentucky, §§ 36, 37. The Missouri code contains only the first paragraph, as art. 1, § 6, the same as § 36 of the Ohio code.

² New York, § 120; Kansas, § 39; Minnesota, § 35; Wisconsin, ch. 123, § 21; Nebraska, § 44; Florida, § 71; Ohio, § 38; Indiana, § 20; Oregon, § 36; South Carolina, § 143; North Carolina, § 63; Nevada, § 15; Dacotah, § 73; Washington, § 16; Idaho, § 15; Wyoming, § 43; Montana, § 15. In California, § 383, is the same, adding, “and sureties on the same or separate instruments,” after the words “promissory notes.” The provision in

Nevada, Idaho, Wyoming, and Montana is also the same as that in California. For the corresponding sections in the codes of Kentucky, Iowa, and Missouri, see *infra*, § 403. In these codes the change in the common-law doctrine is carried to a much greater length; the distinctions between joint, joint and several, and several liabilities are utterly abrogated. The same radical change is made in North Carolina. “§ 63 *a*. In all cases of joint contract of copartners in trade or others, suits may be brought and prosecuted on the same against all or any number of the persons making such contract.” In Nevada, § 14, and Wyoming, § 42, it is provided that “joint tenants, tenants in common, or copartners, or any number less than all, may jointly or severally” sue and be sued. A similar clause is found in the California code, § 384, except that “coparceners” is substituted for “copartners.” Placing “copartners” in the same position as “joint tenants” and “tenants in common,” is a very strange provision, and was doubtless an oversight.

portant decisions, and even certain practical rules which might naturally have been introduced in this connection, are, therefore, postponed for the present, and will appear in a subsequent chapter. Joint and several rights and liabilities involve both the questions of joint and several judgments, and of the union and severance of parties plaintiff and defendant. It would only produce confusion, however, if we should anticipate the regular order of the subject-matter, and should attempt to combine in a single discussion all the particular topics which enter into the theory of joint and of several liabilities. In carrying out the design of the present section, I shall follow the general plan adopted in the one last preceding, and shall (1) state in a concise manner the established rules of the common law concerning the selection and joinder of defendants in legal actions; (2) determine the general principles introduced by the reform legislation, and the true theory of its interpretation; and (3) exhibit the application of these principles made by the decided cases, explain the changes which have been made in the former system, and ascertain the practical rules as to parties defendant as they now exist.

The Common-law Doctrines and Rules.

§ 273. Whenever any liability rests upon two or more persons as the consequence of the same act or event, the common law regarded such liability in general as either joint, joint and several, or several. This division had originally a twofold relation; for it affected both the external forms and modes of enforcing the liability by actions at law, and also the essential nature of the liability independent of any such mere methods of enforcement. In other words, these three classes differed from each other in respect to the joining or the not joining of the persons liable in a single action. This was doubtless the most important element of difference among them; it remained unchanged while the common-law procedure existed; and the principal question to be determined by the present discussion is, whether it has been changed by the provisions of the new American system. But, in addition to this element of difference, which related solely to the mode of enforcement, there was another still which related to the existence and duration — that is, to the very being — of the liability. Joint liability was distinguished from the other two classes in this, that,

at the death of one of the persons upon whom the joint duty rested, such obligation absolutely ended as to his estate and representatives, and became entirely concentrated, as it were, upon the survivors. As one after another died, the same process continued, until the whole liability rested, as a sole obligation, upon the last survivor of all, and, upon his death, passed to his estate and personal representatives. This doctrine of survivorship prevailed at the common law, and, at an early day, before the innovations made by equity, it was the ordinary practical rule controlling the relations between debtor and creditor; so that if one of two joint debtors died, the creditor had absolutely no recourse of any kind except against the person and property of the survivor, the estate of the deceased debtor being freed from all claim whatsoever. Even after relief became possible from the courts of equity, the doctrine continued to prevail under exactly the same form in courts of law and in legal actions, so that such actions could only be maintained against the survivors; and if the creditor was restricted to the law courts and to the modes of remedy which they furnished, the ancient rule applied to him with full force and effect. The relief granted by equity, however, had long rendered this rule a mere matter of form. The primitive doctrine had long been practically abandoned; the liability was not, in fact, confined to the survivor of the joint debtors; the estate of the deceased might be held responsible; only the creditor must pursue his remedy in a court of equity, instead of a court of law. This result was natural and proper enough as long as two separate species of tribunals and two distinct systems of procedure were retained; but that the same result should continue after the jurisdictions had been consolidated into one, and after all distinctions between actions at law and suits in equity had been abolished, and one mode had been established for the pursuit of all civil remedies, is, beyond the power of expression, absurd.

§ 274. Such being the two generic elements of distinction between the three classes of liabilities established by the common law, it is of the utmost importance to determine the marks which distinguish one from the other, and to ascertain in this manner what liabilities are joint, what joint and several, and what several. Liability may arise either from contract, or from some act which is not a contract, and to which the name *tort* has been given by

English and American writers and judges. Little difficulty exists in reference to liabilities arising from torts; it will be seen in the sequel that they are not, in general, joint in their nature. In respect to liabilities springing from contract, the difficulty is much greater, as there is no such simple and comprehensive rule. The discussion found in the preceding section,¹ concerning joint and several *rights*, applies as well in its general features to the subject of liabilities; the same essential principles are controlling in either case. While, however, the nature of the interest, rather than the form of the promise or obligation, is the ultimate criterion by which to ascertain whether the *right* is several or joint, the form of the promise or obligation alone determines the character of the *liability* when the contract is express, and the intention of the parties gathered from all the surrounding circumstances, when the contract is implied.

§ 275. Applying this test, the following are the general principles, stated in a very concise manner, which define the nature of liabilities arising from contract, and separate them into the three groups or classes already mentioned. Whenever a liability resting upon two or more persons is created by contract, the presumption is that such liability is joint, — that is to say, it is joint, unless express words and terms of the contract make it several, or joint and several. The tendency or inclination of the law is in favor of joint liabilities; no express language is necessary to produce that quality; but, on the other hand, some special terms or words are requisite to bring the liability into either of the two other classes.² An ancient work of high authority says: “If two, three, or more bind themselves in an obligation thus *obligamus nos* [that is, we bind ourselves, we undertake, we promise], and say no more, the obligation is, and shall be, taken to be joint only, and not several.”³ If two or more contract with the same person to do or to forbear from *one and the same thing*, their liability is joint, in the absence of any special words to show that a different one is intended. This rule is emphatically true in cases of implied liabilities.⁴ Whether the liability is joint, joint and several, or several, depends upon the terms of the contract, if express; upon the intention of the parties gathered from the circumstances, if implied.⁵

¹ See *supra*, §§ 185, 186.

² 1 Parsons on Cont., p. 11, and cases cited.

³ Shepherd's Touchstone, p. 375. See Ehle v. Purdy, 6 Wend. 629.

⁴ 1 Ch. Pl. (Springfield ed., 1840), p. 41.

⁵ Peckham v. North Parish, 16 Pick. 274, 288, per Wilde J.; 1 Parsons on Cont., p. 11.

§ 276. A joint and several liability generally arises from express language of the agreement, such as, "we jointly and severally promise." If, however, a promise is written in the singular number, but is actually made by two or more as the obligors or promisors, their liability is joint and several; as, for example, a promissory note in the form, "I promise to pay," &c., but signed by several persons as the makers.¹ This particular species of liability seems to demand express language of some sort for its creation; it is never found as a feature of implied contracts, unless, perhaps, in those instances where the injured party may, at his election, regard the wrong done him as a breach of implied contract, or as a tort; but in these instances it will be found that the fundamental element of the liability is tort, and not contract. Having determined into which of the three classes a given liability falls by the application of the foregoing principles, we are next to consider the common-law rules which control the union or severance of the parties thereto as defendants in actions at law. I shall consider separately actions *ex contractu* and actions *ex delicto*.

§ 277. *I. Actions ex contractu, or those in which the liability arises from contract.* When the liability is joint, all the persons upon whom it rests must be united as defendants in an action brought upon the contract. This rule is general, and applies to undertakings, obligations, and promises of all possible descriptions.² There are, however, two apparent, if not real, exceptions. Dormant partners need not be made defendants in an action against the firm, although of course they may be joined.³ Also, when infants or married women have in form contracted jointly with persons *sui juris*, their names should be omitted as defendants in an action upon the contract, and the suit should be brought against the parties alone who were able to contract.⁴ The last rule in relation to married women has been abrogated in all those States which now permit wives to engage in business and to bind themselves by contract. The modern legislation on this subject will be stated, and its results explained, in a subsequent

¹ *Sayor v. Clayton*, 1 Lutw. 695, 697, per Powell J.; *Van Alstyne v. Van Slyck*, 10 Barb. 383; *Hemmenway v. Stone*, 7 Mass. 58. But see, for a peculiar case, in which, from the special provisions of the contract, this rule was not applied, *Slater v. Magraw*, 12 Gill & Johns. 265.

² 1 Ch. Pl., p. 42, and cases cited; 1 Wms. Saund. 153, n. (1); *Ib.* 291 b, n. (4).

³ 1 Ch. Pl., p. 43, and cases cited.

⁴ *Ibid.*

portion of the present section.¹ When the liability is a several one, each of the obligors or promisors, or persons upon whom the obligation rests, must be sued in a separate and distinct action.² Finally, when the liability is joint and several, the creditor has a choice of two modes: he may treat the liability as a *joint* one, and sue *all* the parties subject to it in a single action, or he may treat it as a *several* one, and sue *each* of the parties subject to it in a separate action; he has no other alternative, and cannot proceed against a portion more than one but less than all.³

§ 278. The consequences of a violation of these various rules were very serious. The error might consist either in a *misjoinder* — the uniting too many parties, or in a *nonjoinder* — the uniting too few parties; they will be considered separately. Independently of any statute authorizing a suit against two or more persons not jointly liable,⁴ a legal action, brought against two or more defendants, necessarily implied, at the common law, that the persons thus sued were jointly liable, or at least that, their liability being joint and several, the plaintiff had elected to treat it as a joint one. In an action upon contract against two or more defendants, it must appear, therefore, in the plaintiff's pleadings, that the contract is a joint one, and this fact must also be proved at the trial. If too many persons have been made defendants, and this mistake appears upon the face of the pleading, the defendants may either demur, move in arrest of judgment, or have a reversal on a writ of error; if the mistake does not appear on the pleadings, but the plaintiff fails to prove the joint undertaking or promise as alleged, he will be nonsuited at the trial.⁵ This rule was applied to all actions that were brought *upon a contract*, whatever might be the form of the action; but it was not applied if the cause of action was really and primarily a tort, and the plaintiff had an election to treat it as the breach of an implied contract, — as, for example, in an action on the case against common carriers.⁶ The general effect of a misjoinder, as

¹ See *infra*, §§ 318 *et seq.*

² 1 Ch. Pl., p. 43.

³ 1 Ch. Pl., p. 43; 1 Parsons on Cont., p. 12; Bac. Abr. Obligation, D. 4; 2 Vin. Abr. 68, pl. 7; Cabell v. Vaughan, 1 Wms. Saund. 291 e, 291 f, n. (4); Eccleston v. Cliphsham, 1 Wms. Saund. 158, n. (1); Streatfield v. Halliday, 8 T. R. 782.

⁴ As, for example, the statute permitting the maker and indorsers of a promissory note, and the drawer, acceptor, and indorsers of a bill of exchange to be joined as defendants.

⁵ 1 Ch. Pl., p. 44, and cases cited.

⁶ Ibid. This well illustrates the nicety — *verbal nicety* — of distinctions often made by the ancient common-law judges.

above stated, followed, at the common law, even in the case of a married woman or an infant being made a codefendant, who could not in law make a binding contract. Although all the defendants may have physically entered into the agreement, yet as the infant or married woman had no legal capacity to make it effective, and as to them it was either void or voidable, their being made parties was a case of misjoinder, and the plaintiff thereby incurred the penalty of nonsuit. Under the circumstances thus described, the proper mode for the plaintiff to pursue was to omit the married woman or the infant, and to sue only the other parties. This particular rule, however, had not been followed in all the States, even prior to the introduction of the new system; in New York, and in several other commonwealths, the plaintiff, if he had made a married woman or an infant a party defendant, could discontinue as to such person, and could proceed with his action against the other defendants.¹ If one defendant should be discharged by operation of law after the action was commenced, as by a discharge in bankruptcy, &c., the plaintiff could discontinue as to him, and the suit would go on as to the others.²

§ 279. *Nonjoinder*. The consequences of a nonjoinder of all the persons who should have been made defendants, were by no means so serious. The objection to the nonjoinder of defendants liable to be sued jointly upon contract, or as sharers in the profits of real estate, could only be taken advantage of by a plea in abatement, which should state the names and residences of the parties said to be omitted. In default of this mode of presenting the defence, the objection was entirely waived.³

§ 280. If one of the obligors or promisors in a joint contract dies, the liability at the common law rests upon the survivors only; none passes to the estate of the deceased. An action at law can therefore be maintained only against the survivors or the survivor. When the last survivor dies, his personal representatives are the only possible defendants in a legal action.⁴ If the contract is joint and several, death does not produce such an

The ground of the action against a common carrier was primarily his general duty to the public, and a breach of this duty was a tort, although the plaintiff might, if he chose, bring *assumpsit*.

¹ 1 Ch. Pl., p. 46, and cases cited.

² *Ibid.* p. 46.

³ *Ibid.* p. 46.

⁴ 1 Ch. Pl., p. 50; Bac. Abr., *Obligation*, D. 4; *Yorks v. Peck*, 14 Barb. 644; *Foster v. Hooper*, 2 Mass. 572.

entire effect; the personal representatives of the deceased party may be sued separately, but not jointly with the survivors. A joinder of these parties is not permitted, because against the representatives the judgment must be *de bonis testatoris*, while against the survivors it must be *de bonis propriis*, and the common law does not tolerate a double judgment in one action.¹

§ 281. *II. Actions ex delicto, or those in which the liability arises from a tort.* The general doctrine is, that the liability arising from torts committed by two or more is joint and several in its nature, or, to be accurate, it resembles a joint and several liability. The exceptions are few. Certain personal torts are of such a nature that they cannot be committed by two persons *jointly*; although two persons might commit the same kind of tort at the same exact time, upon the same party, they would not commit the one identical tort. If many persons should unite in an assault and battery, there would be but one assault and battery, notwithstanding the number of the wrongdoers; but if two should utter the same slanderous words, even at the same instant of time, there would be two slanders, one done by each. Certain torts, few in number, are therefore, from their nature, essentially several. In a few particular instances, torts having reference to real estate are essentially joint. In pursuance of the general rule, as given above, if the tort is of such a nature that it *may* be committed by two or more persons in combination, the injured party may bring an action against all the wrongdoers, against any number of them, or against one of them, or may bring a separate action against each one, or against any part of the whole.² The liability is much broader, therefore, than one which is simply joint and several. If, in contemplation of law, the single tort cannot be committed by two or more together, and can only be a different tort by each, a separate action must be brought against each wrongdoer.³ When tenants in common, or joint tenants of land, are liable in an action of tort for anything respecting the land, they must all be made defendants; and if one only is sued, he may plead the nonjoinder of the others in abatement.⁴ If

¹ 1 Ch. Pl., p. 50; 1 Parsons on Cont., p. 29; Towers v. Moore, 2 Vern. 99. This reason given for the common-law rule is merely verbal. There is, of course, no actual difficulty in the way of such a division in the judgment.

² 1 Ch. Pl., p. 85, and cases cited; Bac.

Abr., Actions in General, C.; 2 Wms. Saund. 117 a.

³ Ibid.; Thomas v. Rumsey, 6 Johns. 82.

⁴ 1 Ch. Pl., p. 87; Bac. Abr., Joint Ten., K.

two or more persons are sued jointly for trespass or conversion, a joint taking must be proved.¹

§ 282. When persons are sued jointly for a tort which cannot be joint, they may demur; or, if a verdict has been given against all, the judgment may be arrested or reversed on error. But the plaintiff may have a verdict against one, and discontinue as to the other.² In all other cases where several persons may be sued jointly for a tort, the misjoinder of defendants in an action *ex delicto* does not defeat the recovery, for a verdict may be given against some and in favor of the others. There can, of course, be no objection for a *nonjoinder* in such cases, for the plaintiff may sue as many of the wrongdoers as he pleases.³ The last rule applies, however, to torts only which are *unconnected with contract*. If an action in form for a tort is really based upon the non-performance of a contract, the rules as to actions on contract control, for the plaintiff cannot change the rules of law as to the liability of defendants by merely changing the form or kind of action which he brings.⁴ In actions of tort against common carriers and innkeepers, the general rule before stated is strictly enforced, for their liability is primarily founded upon their general common-law duty, and not upon the contract made with the shipper or the guest. If sued, therefore, in an action for negligent loss or injury to goods, they cannot object on account of any nonjoinder; but if sued in an action founded upon their implied or express contract to carry or keep the goods safely, such an objection would be available.⁵ The theory is, that the liability of the common carrier, or of the innkeeper, does not arise from contract, but the plaintiff may elect to proceed upon the contract; in the other cases, the primary liability does spring from contract, but the plaintiff may elect to sue on the tort.

§ 283. III. *Actions against husband and wife*. The following are the common-law rules in respect to actions against the husband and wife, or the husband alone, in relation to claims originating from some act or default of the wife. The wife could under no circumstances be sued alone at law.⁶ When a woman,

¹ 1 Ch. Pl., p. 86, and cases cited.

² 1 Ch. Pl., p. 86; Bac. Abr., Actions in General, C.; 2 Wms. Saund. 117 b. (n).

³ 1 Ch. Pl., p. 86. A joint action is not possible against two separate owners of dogs which have killed the plaintiffs' sheep. *Van Steenburgh v. Tobias*, 17

Wend. 562; *Russell v. Tomlinson*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9.

⁴ 1 Ch. Pl., p. 87, and cases cited.

⁵ *Ibid*.

⁶ 1 Ch. Pl., p. 57, and cases cited; Com. Dig. Plead., 2 A. 1.

liable upon a contract, marries, the husband and wife must during the marriage be sued jointly, even though he has expressly promised to pay the debt or to perform the contract.¹ If a lease was made by the wife when single, and rent thereon falls due after the marriage, or if any other contract so made by her is broken, so that a right of action arises after the marriage, the action may be either brought against both or against the husband alone.² The common law did not permit the wife to create any liability by her own contract during the marriage; any contract which she could enter into so that it would be binding at law, would necessarily be the contract of *her husband*, made by her as his agent, and he alone would be liable to an action thereon. If the wife had committed any torts while single, or if she committed any during the marriage, the action in respect of them must be against herself and her husband jointly;³ except in the case where, the wrongful act being done in his presence and by his direction, she was regarded as acting under compulsion, and free from liability, and the action could only be brought against him.⁴

The General Principles of the Reformed Procedure in reference to Parties Defendant; the True Theory of Interpretation.

§ 284. The foregoing are the doctrines and rules as to parties defendant in legal actions, which were firmly established as part of the common law prior to any statutory change, and especially prior to the great change introduced by the codes which inaugurated the reformed American procedure in many of the States. It should be remembered that this statement relates solely to actions at law, and does not apply to suits prosecuted in tribunals having an equitable jurisdiction and following equitable methods. The practical question which now presents itself, and which I shall attempt to answer, is: How far have these common-law doctrines and rules as to parties defendant in legal actions been retained, and how far entirely abrogated or partially modified, in judicial proceedings of the same nature, by the provisions of the new system? This question assumes that some actions are still legal in their nature, and some are equitable, although the forms of all

¹ Ibid.; Bac. Abr., Baron and Feme, L. and Feme, L.; Com. Dig., Baron and

² 1 Ch. Pl., p. 58, and cases cited. Feme, Y.; Co. Litt. 351 b.

³ 1 Ch. Pl., p. 92; Bac. Abr., Baron ⁴ Cassin v. Delany, 38 N. Y. 178.

actions, and the distinctions between them, have been abolished. This subject has been sufficiently discussed in the preceding chapter. It is universally conceded that in all actions which are equitable in their nature, that is, which are brought upon an equitable cause of action and seek to obtain an equitable remedy, the doctrines of equity as to parties are as fully controlling now as they were when the jurisdiction of equity was separate and distinct from that of law. The only possible occasion for doubt, therefore, exists in relation to actions which, prior to the reform, would have been "actions at law," and which now may perhaps be generically termed "legal actions," because they are based upon a legal right and seek to obtain a legal remedy. What, if any, and how great changes in these ancient rules of the common law as to parties defendant, have the provisions of the various codes recited at the commencement of this section, made in such actions? Do these general clauses embrace and in their full extent apply to such actions, or are they limited in their operation to those that are equitable in their nature? The ancient rules relating to defendants, which have been briefly stated above, are certainly left in active operation at the present time, and now as well as formerly determine the selection of the parties in legal suits, except so far as they may have been abrogated or modified by the legislation referred to. In other words, these rules were originally the sole guides in the construction of a legal action; so far as they have been replaced by others, they no longer exist; but so far as they have not been interfered with and changed, they are left as efficacious as though no attempt had been made to reform the procedure. The question is thus reduced to this shape: To how great an extent have these rules been abolished or altered, and to how great an extent are they unchanged?

§ 285. In discussing and answering this question, I shall follow the order adopted in the last preceding section (sixth), while pursuing a similar inquiry in respect to parties plaintiff. I shall (1) ascertain and disclose the general intent and object of the legislative enactment, and shall (2) apply the results thus reached to particular cases and rules, as far as they have been determined and established by judicial decision. In this latter branch of the discussion I shall consider in order, (1) legal actions to recover possession of land, or against the owners of land; (2) legal actions

to recover possession of chattels, or against the owners of chattels; (3) legal actions upon contracts; (4) legal actions for torts; (5) legal actions, generally allowed by statute, in reference to the settlement of deceased persons' estates; (6) some special legal actions not falling within either of the preceding heads; (7) actions against husband and wife, or either of them, as affected by the marriage relation; and (8) equitable actions.

§ 286. What is the general intent and object of the legislation in reference to parties defendant, taken as a whole? What principle of construction should be adopted in arriving at the practical meaning and effect of the various provisions of the State codes already quoted? These questions, which are certainly fundamental, were thoroughly discussed in the last section, and a reiteration of the reasoning there presented would be entirely useless. It cannot be doubted that the legislature proposed to itself the same object, and was actuated by the same intent, in the rules which it has prescribed for defendants as in those which it has adopted for plaintiffs. I dwell upon the fact, which is apparent upon the most cursory reading, that the clauses concerning defendants are more full and detailed, and more clearly set forth the equitable doctrines, than those concerning plaintiffs. This fact is very obvious when we refer to the subsequent sections of the codes defining the forms of judgments, and authorizing a severance among the parties in rendering judgment, and also when we refer to the special provisions in many codes which utterly abolish the ancient legal distinctions between joint, joint and several, and several liabilities. The conclusions reached in the preceding section, and repeated here, are the following: The legislature does not seem to have intended to abandon the ancient doctrine in respect to joint and several *rights*; and, in fact, the complete adoption of the equitable principles which regulate the union of parties would not require such a change, for in equity, as well as in law, all persons having a joint right must in general unite in a suit to enforce that right. The legislature, on the other hand, does seem to have intended to effect a change more or less thorough in the common-law rules which determine the differences between joint, joint and several, and several liabilities, and which regulate the selection and union of defendants in the case of one or the other of these liabilities. This intent,

sufficiently indicated in all the codes, is placed beyond a doubt by the express provisions of others. The general conclusions of the discussion concerning plaintiffs, found in the last preceding section, are equally true of parties defendant. Believing them to be a correct interpretation of the codes, I adopt them here without any unnecessary repetition of the reasoning by which they were established.¹ The rules which the legislatures have put into a statutory form are confessedly the general doctrines of equity concerning defendants. They apply in terms to the civil action appropriate for the pursuit of all remedies; no exceptions are made or suggested. The design of the legislature is therefore plain, that these equitable doctrines and rules should be controlling in all cases, and should not be confined to actions which are equitable in their nature. It must be confessed at once, however, that this conclusion has not been accepted by all the courts, nor in its full extent, perhaps, by any. The general expressions of the codes, although their main design is evident enough, have not been regarded as sufficiently explicit, detailed, and peremptory to abrogate and sweep away all of the long-settled particular rules of the former system. In other words, the change, as it has been wrought out by judicial decision, has been made partial and incomplete, and has been far more radical and perfect in certain of the States than in others. It is impossible to lay down in an explicit manner any more definite principle of interpretation than that here given. The actual position of the courts must be learned from their decision of particular cases, and from the special rules concerning defendants in various classes of actions which have been established by them, and which will be detailed in the following portions of this section.²

¹ See *supra*, §§ 196-200.

² The general theory of the codes, and the principles of the new procedure in respect of parties defendant, are discussed with more or less fulness in the following cases: *Wilson v. Castro*, 31 Cal. 420; *Bowers v. Keesecher*, 9 Iowa, 422; *Nelson v. Hart*, 8 Ind. 293; *Braxton v. State*, 25 Ind. 82; *Tinkum v. O'Neale*, 5 Nev. 98; *Smetters v. Rainey*, 14 Ohio St. 287, 291;

Union Bank v. Bell, 14 Ohio St. 200, 211.

Where a demand exists in favor of a firm, and one partner refuses to join as a plaintiff, he may be made a defendant in an ordinary legal action brought by his co-partners to recover the debt. *Hill v. Marsh*, 46 Ind. 218. This ruling, in my opinion, exhibits the true intent of the codes in the clearest possible manner.

Particular Rules and Doctrines.

§ 287. *How the questions of misjoinder or nonjoinder are to be raised.* Before proceeding to the examination in detail of the particular rules and doctrines as to defendants, which have been established by judicial decision, I shall inquire how the questions may be raised in the progress of an action; when the objection of a misjoinder or a nonjoinder is waived; and what is the effect of such an error in the proceedings, if properly brought before the court for adjudication. I have already quoted and discussed the statutory provisions which prescribe the modes of raising the questions in reference to plaintiffs;¹ and the same rules exist in the case of defendants, for the language of the codes in defining these methods applies alike to both parties.² It was shown, in the paragraphs referred to, that "defect" of parties refers solely to the non-joinder of the proper plaintiffs or defendants, — to the fact of too few parties. This construction is universal.³ It is settled by an overwhelming and unanimous array of authorities, (1) that if the defect of parties defendant — as thus defined — appears on the face of the complaint or petition the defendant who desires to raise the question must demur upon that specific ground, an allegation of the defect in the answer as a defence being nugatory; (2) when the defect does not thus appear on the face of the plaintiff's pleading, the defendant must raise the objection in his answer as a defence; and, (3) if both of these methods are omitted, or if one of them is employed when the other is proper, the defendant waives all objection to the defect or nonjoinder.⁴ In no case can this objec-

¹ See *supra*, §§ 206, 207.

² See the citations from the codes, and the cases collected *supra*, §§ 206, 207; *Hill v. Marsh*, 46 Ind. 218; *Morgan v. Carroll*, 85 Iowa, 22, 24, 25; *Beckwith v. Dargels*, 18 Iowa, 808; *School District, &c. v. Pratt*, 17 Iowa, 16; *Byers v. Rodabaugh*, 17 Iowa, 58.

³ *Ibid.*; *Truesdale v. Rhodes*, 26 Wisc. 215, 219, 220. *Read v. Sang*, 21 Wisc. 678, laid down a different rule, but the Wisconsin court is now in harmony with those of all the other States.

⁴ *Bevier v. Dillingham*, 18 Wisc. 529;

Burhop v. Milwaukee, 18 Wisc. 431; *Cord v. Hirsch*, 17 Wisc. 403; *Carney v. La Cross, &c. R. R.*, 15 Wisc. 508; *Lowry v. Harris*, 12 Minn. 255; *Mitchell v. Bank of St. Paul*, 7 Minn. 262; *Carr v. Waldron*, 44 Mo. 398; *Makepeace v. Davis*, 27 Ind. 852; *Little v. Johnson*, 26 Ind. 170; *Johnson v. Britton*, 23 Ind. 105; *Shane v. Lowry*, 48 Ind. 205, 206; *Strong v. Downing*, 34 Ind. 800; *Turner v. First National Bank*, 26 Iowa, 562; *Hosley v. Black*, 23 N. Y. 488; *Kingsland v. Braisted*, 2 Lans. 17; *Sager v. Nichols*, 1 Daly, 1; *Bridge v. Payson*, 5 Sandf. 210; *Lewis v. Williams*

tion be raised by a demurrer on the ground that the pleading does not state facts sufficient to constitute a cause of action. Although this rule is so firmly settled, yet if, on the trial, or even on appeal, the court sees that other parties are indispensable to a full determination of the questions at issue, it may, on its own motion, even though the defect has not been pointed out by answer or demurrer, order the additional parties to be brought in. This power is expressly given by all the codes, and was a familiar doctrine of the equity procedure. The language of the statutes is certainly broad enough to permit the exercise of this power in legal as well as in equitable actions; but, practically, the courts confine its operation to the latter class.¹ When the defendant sets up in his *answer* the defence of nonjoinder, he must state the names and places of residence of the other persons whom he alleges to be necessary defendants. This old rule of the common-law pleading has not been altered by the new legislation.²

§ 288. The foregoing being the methods of raising the questions as to a defect of parties defendant, the inquiry arises, What is the effect of such defect when established in either of these methods? If, upon demurrer, it is held that the plaintiff has failed to unite all the necessary defendants, he will be permitted to amend, as a matter of course, upon the terms as to costs prescribed by the practice. When the defence is set up in the answer, the same opportunity is given to the plaintiff to amend, and to reconstruct his action. If the defect is not removed in this manner, it will certainly defeat any *legal* action, although not necessarily, perhaps, an equitable one. Undoubtedly, the codes, adopting the doctrine of equity tribunals, and extending it to all cases, permit the court in its discretion to retain the cause, under such circumstances, until the other necessary parties are

¹ Minn. 151; *Hier v. Staples*, 51 N. Y. 136; *Fort Stanwix Bank v. Leggett*, 51 N. Y. 552; *Potter v. Ellice*, 48 N. Y. 321; *Parisich v. Bean*, 48 Cal. 364; *Rutenberg v. Main*, 47 Cal. 218; *Gillam v. Sigman*, 29 Cal. 637. See, however, *Muir v. Gibson*, 8 Ind. 187; *Shaver v. Brainard*, 29 Barb. 25.

¹ As illustrations, see *Muir v. Gibson*, 8 Ind. 187; *Shaver v. Brainard*, 29 Barb. 25.

² *Kingsland v. Braisted*, 2 Lans. 17. Where such an answer was defective in

certain particulars, although it conveyed the information needed, and all the requisites of the defence were proved on the trial, the defect was held cured. *Wooster v. Chamberlin*, 28 Barb. 602. It has been held in Indiana that a demurrer to the complaint, on the ground of a nonjoinder of defendants, must also show who ought to have been added as defendants, and that, failing to do so, it will be overruled. *Willett v. Porter*, 42 Ind. 250, 254.

brought in, instead of dismissing it altogether. It is plain that the language of the statutes is general, and embraces all species of actions, no exception being expressed or intimated; and there can be no pretence that it is not as practicable and as easy to deal with legal actions in this manner as with equitable suits. Practically, however, the authority thus given to the courts is restricted to equitable actions, while legal actions are disposed of in the same manner and by the same rules as before the reformed system was adopted, — that is, the nonjoinder of a necessary defendant, when not cured by amendment, defeats *that* action, although it does not destroy the cause of action. It may be instructive to compare these results with the provisions of the new English procedure, which declare that under no circumstances shall a cause be defeated or dismissed on account either of a nonjoinder or of a misjoinder of parties.¹

§ 289. I pass now to the misjoinder or improper uniting of defendants.² Two cases present themselves which might perhaps be regarded as falling under this head: namely, (1) Where *all* of the defendants are improperly sued; and, (2) Where one or more are properly sued, and the others are improperly joined with them. The latter only is a true case of technical “misjoinder.” The first is the ordinary case of an action entirely misconceived, and the complaint or petition failing to disclose any ground for relief, so that all the defendants jointly or each of them separately, according to the circumstances, might either demur for want of sufficient facts, or move to dismiss the action on the trial. Such a case does not fall within the special rules of procedure which relate to *parties*, but is to be determined by the general doctrines of the law defining rights and liabilities. The second of the two cases just described does come within the subject-matter of parties defendant, and is to be considered under two aspects, which give rise to two very different classes of questions. These two aspects are the following: It being supposed

¹ The “Supreme Court of Judicature Act” of 1873; Schedule, Rule 9.

² The admirable rule is adopted in North Carolina that a *mis*-joinder of parties, either plaintiffs or defendants, shall never defeat *any* action. If plaintiffs are improperly united, the defendant shall have judgment against them for costs; if

defendants, they may disclaim and have their costs against the plaintiff. This is carrying out the true spirit of the reform; it fully sustains the theoretical position taken in the text, and might well be followed in all the States. *Green v. Green*, 69 N. C. 294, 298.

that one or more defendants, whom I will call A., are properly sued, and that one or more others, whom I will call B., are improperly joined in the action, the matters for consideration which can possibly arise from these facts are: (1) How shall the proper defendants, A., take advantage of the error, and what effect (if any) will it have upon their rights? and, (2) How shall the improper defendants, B., raise the objection, and what effect (if any) will the error have upon their rights? It is plain that these two sets of defendants occupy very dissimilar positions in the action; that their rights are very different, and that while the latter are entitled to full relief, the former may not be in the least injured or affected by the misjoinder. Much confusion in practice has resulted from the neglect to distinguish between these two cases.

§ 290. Proceeding to the discussion of these two cases separately, I shall state the rules established in respect to the first of them, and shall illustrate by a striking example the extent to which the common-law doctrines have been changed by the reformed procedure. When a legal action is brought against two or more defendants upon an alleged *joint* liability, even though based upon a *joint contract*, and one or more of them are, so far as they are individually concerned, properly sued, but the others are improperly united, the defendants properly sued have no cause of complaint whatsoever, in any form, on account of the misjoinder; they cannot demur or answer for defect of parties, because there is no "defect;" they cannot demur generally for want of sufficient facts, because sufficient facts are averred as against them; they cannot demur or answer on account of this *misjoinder*, because that particular ground of objection is not provided for by the codes.¹ If on the trial the cause of action is proved against *them*, but none against them *and the others*, still the plaintiff will not be absolutely nonsuited; he will recover his judgment against them according to the right of action established by the proof; while as against the other defendants he will fail, and will be nonsuited, or his complaint be dismissed. This result of the reform legislation is a very great departure from the former practice. At the common law, if a plaintiff alleged a *joint* cause of action against two or more defendants, and failed

¹ An exception must, of course, be made of those codes which expressly provide, as a distinct cause of demurrer or defence, the *misjoinder* of parties, — namely, Missouri, California.

to prove the case as set out in his pleading, he was defeated as to all; he could not recover against a part and fail as to the others. The interpretation of the codes, as thus stated, is based partly upon the sections already quoted in relation to defendants, and partly upon other sections—to be fully discussed hereafter—in relation to the form, and manner of recovery and entry of judgments. By combining these various provisions, and by a construction of them in accordance with their plain spirit and meaning, the courts have deduced the rules here given. To those defendants who are sued in a legal action, even though upon an alleged joint liability, and who are actually liable upon the contract or other cause of action averred, the fact that other persons are also added as codefendants, however improperly, is no defence, is no answer to the action in any manner or form. This doctrine is fully established by the cases collected in the footnote, and in many others which it is unnecessary to cite.¹ The rule being thus established in the extreme case of legal actions alleging a joint liability upon contract, it is of course equally true in all other legal actions based upon a liability which at the common law was several, and in which the misjoinder of some defendants would have been no defence as to those properly sued,—as, for example, in actions for torts. *A fortiori*, does the same doctrine apply in all equitable actions. Under the former system, the improper uniting of codefendants was never a sufficient ground for preventing a decree against those who were properly made parties if the suit was in equity.²

§ 291. The situation of those parties improperly joined as codefendants is, of course, very different from that just described.

¹ McIntosh v. Ensign, 28 N. Y. 169, 172. Wright J., after stating the common-law rule in actions upon a joint contract, said: "But that is not the present rule. A plaintiff is not now to be non-suited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved, had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown." See also, per Emott J., pp. 174, 175; Brumskill v. James, 11 N. Y. 294; Marquat v. Marquat, 12 N. Y. 386; Harrington v. Higham, 15 Barb. 524; Parker v.

Jackson, 16 Barb. 33; N. Y. & N. H. R. R. v. Schuyler, 17 N. Y. 592; Coakley v. Chamberlain, 8 Abb. Pr. n. s. 37; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Truesdell v. Rhodes, 26 Wisc. 215, 219, 220; McGonigal v. Colter, 32 Wisc. 614; Willard v. Reas, 26 Wisc. 540, 544; Alnutt v. Leper, 48 Mo. 319; Brown v. Woods, 48 Mo. 380; Rutenberg v. Main, 47 Cal. 213, 221; Aucker v. Adams, 23 Ohio St. 543, 548-550; Lampkin v. Chisom, 10 Ohio St. 40. See also cases cited, *infra*, under § 291 of the text in reference to the remedy by those who are improperly joined.

² See N. Y. & N. H. R. R. v. Schuyler, 17 N. Y. 592.

The very statement of the case assumes that the action is wrongly brought as against them; that, either as disclosed by the allegations of the plaintiff's pleading, or as discovered by the evidence on the trial, no cause of action exists against them, notwithstanding the one which exists against their codefendants. If, therefore, in such a case, it appears on the face of the complaint or petition that one or more persons have been improperly made defendants, such persons may present the objection by a demurrer, not on the ground of a "defect" of parties, but on the ground that the plaintiff's pleading does not state facts sufficient to constitute a cause of action against them. This demurrer must be interposed only by those defendants who are wrongly sued, *and not by all the defendants jointly*, since, if two or more demur jointly, and as to a portion of them there is no cause for the demurrer, it must fail as to all. The safer practice is, therefore, for each defendant who claims that he is improperly joined, to demur separately and individually from the others. This particular ground of objection is not waived by a neglect to demur, as it is expressly provided in all the codes that the defendant may at the trial interpose the same objection to the plaintiff's recovery, even though he has failed to allege it on the record. If the absence of a cause of action does not appear on the face of the plaintiff's pleading, the defence may be set up in the *separate* answer or answers of the parties who rely upon it. Finally, whatever be the completeness or defect of the allegations made by the plaintiff and of the issues raised in the answers of the defendants, if on the trial the evidence fails to establish a cause of action against some portion of the defendants, and it thus appears that they had been wrongfully proceeded against in the action, the plaintiff will be nonsuited, or his complaint or petition dismissed as to them, and his recovery will be limited to the others against whom a cause of action is made out. The foregoing rules are sustained by the cases with almost absolute unanimity.¹ These are the more

¹ *Young v. N. Y., &c. Steamship Co.*, 10 Abb. Pr. 229; *Mitchell v. Bank of St. Paul*, 7 Minn. 252, 256; *Nichols v. Randall*, 5 Minn. 304; *Seager v. Burns*, 4 Minn. 141; *Lewis v. Williams*, 8 Minn. 151; *Makepeace v. Davis*, 27 Ind. 352, 355; *McGonigal v. Colter*, 32 Wisc. 614; *Webster v. Tibbits*, 19 Wisc. 488; *Truesdell v. Rhodes*, 26 Wisc. 215, 219, 220;

Willard v. Reas, 26 Wisc. 540, 544; *Ruttenberg v. Main*, 47 Cal. 218, 221. A joint action against several defendants on a joint contract. All the defendants denied making the contract, but no defence of misjoinder was pleaded. On the trial, it was proved that the contract was made by some of the defendants, but not by all. It was held that the plaintiff should re-

regular and formal modes of raising the questions as to misjoinder by those defendants who are thus wrongfully made parties to a suit; but there undoubtedly may be cases in which the court will proceed in a more summary manner, and will strike off the name of a party on his mere motion. Such cases must of necessity be somewhat exceptional, for, as a general rule, the rights and liabilities of the parties to the record will not be determined on motion or by any other means except a formal trial of the issues.

§ 292. If we sum up the results of the preceding discussion, the following conclusions may be regarded as established beyond any doubt. In ascertaining the effects of a misjoinder of parties, the courts, with great equanimity, have accepted and carried out in practice the spirit and true intent of the reform legislation; namely, that the familiar doctrines of equity should be made controlling in all kinds of actions legal and equitable. They have in this instance entirely abandoned the technical common-law rules, and have assimilated all actions in this respect to a suit in equity. Even in the case where the common-law doctrine of joint liability was the most rigid, they have with perfect ease abandoned it, have treated it as though abrogated by the general expressions of the reform legislation, and have thus demonstrated that the judicial reasoning by which that ancient dogma had been supported was in fact nothing but a formula of words

cover against those defendants who, as it was proved, had entered into the agreement, while, as to the others, the action should be dismissed. After stating that, under § 44, if the misjoinder of defendants does not appear on the face of the complaint, the objection must be taken by answer, or else it is waived, citing *Gillam v. Sigman*, 29 Cal. 687, the court added: "This section applies to actions *ex contractu* and *ex delicto*, and, to the extent necessary to give it effect, it controls the principle that the allegations and proofs must correspond. This only means that if the evidence does not connect all the defendants, — and the misjoinder has not been specially pleaded, — the plaintiff shall not fail against all. Each of the defendants is still entitled to use the joint denial that the contract was made for his own protection; and in case there is fail-

ure of evidence as to any one, that one should have a decision or a verdict in his own favor." The section 44 referred to (present § 433) provides that, where the defects do not appear on the face of the complaint, the objection must be taken by answer. See, however, *per contra*, *Wood v. Olney*, 7 Nev. 109, which holds that when a joint demurrer by defendants is good as to some and bad as to the others, it will not be overruled as to all; it will be sustained as to those who had a good cause of demurrer, and overruled only as to the others. In Missouri, where a misjoinder is made a cause of demurrer, it is held the objection must be set up by those who are thus improperly joined, and not by the others. If the others unite in the demurrer, it will be overruled as to them. *Brown v. Woods*, 48 Mo. 330; *Alnutt v. Leper*, 48 Mo. 819.

without any real force and meaning. They have shown that in a legal action upon contract, no matter what may be the allegations as to the *joint* nature of the liability, it is possible to sever the judgment and to permit a recovery against some defendants and for the others, and thus to bring all cases legal and equitable within the operation of the familiar principles of equity. I dwell upon this special instance of liberal construction because it well illustrates the position which I have *theoretically* maintained as to the general mode of interpreting the codes. The courts of the different States have found no difficulty in adopting and applying the complete doctrine of equity in this case; there is no greater difficulty in adopting and applying the same to all the provisions of the codes relative to parties, and to the amalgamation of equitable and legal principles in the one civil action created by the new procedure. If the rules which control equitable tribunals can be and ought to be introduced into the civil action in respect to the single feature of a misjoinder of defendants, for the same reason they can and ought to be introduced in respect to all the parties and in respect to every other external feature of the judicial proceeding. If the courts had been consistent in this matter, and had not halted in their work of liberal construction, a complete, harmonious, and symmetrical system would long since have been constructed, and the confusion and conflict in principle which now exist would have been avoided. Until this course is freely and systematically adopted, until the courts shall follow out to its legitimate results in all parts and elements of the action the equitable notion which is made everywhere so prominent in the statute, we can never expect to obtain all the simplicity, and clearness, and subordination of external form to substantial facts promised by the new system of procedure.

§ 293. Even in determining the effects of a *nonjoinder* of proper defendants, the courts have failed to interpret the provisions of the codes with the same freedom which they used in that of *misjoinder*; they have hesitated and stopped, when it would have been easy to have gone forward, and to have given the clauses their full force and effect. Undoubtedly the two cases stand upon a somewhat different footing. When a person is himself properly sued, it does not substantially affect his rights or liabilities that another person is also improperly sued with him; that fact does not essentially make his own liability greater

or less. But when a person is sued, he has, in many instances, — certainly in all those legal actions where the liability is joint, and in some equitable suits where the rights and liabilities are complex, — a right that all the others who are also liable with him, or against whom the cause of action exists, or who are necessary parties to a complete determination of the controversy, should be united with him as codefendants, and a neglect to join them is an error against which he should be permitted to object, and from which he should be suffered to obtain a relief. The former equitable procedure, as well as the common-law practice, recognized this right of the defendant. But it is a very different thing to say that such an error, when established, should in any class of cases *absolutely defeat the action*. The error is not *essentially fatal*. This is shown by the practice itself of the courts, which treats the objection as dilatory, and requires it to be presented in a certain technical manner, or else regards it as waived. There is then no reason in the nature of the proceeding why the equity doctrine should not have been applied under these circumstances to all legal actions, so that, when an improper *nonjoinder* is finally established by the decision of the court, the action should never be defeated thereby, but should be retained by the court in order that the plaintiff might add the necessary defendants, and then the cause proceed to judgment on the merits. It is certainly as practicable and as easy to pursue this course with all legal actions, as it is with those that are equitable; and the codes expressly permit, if not require it, in language which in terms embraces every species of suit.

I shall now proceed to consider the particular cases which have arisen, and the various specific rules as to parties defendant which have been established by judicial decision. This examination will show how the general principles of interpretation have been applied by the courts, and will exhibit the system as a whole which has been constructed in respect to the selection and joinder of defendants. The discussion will be separated into three general divisions: namely, legal actions generally; actions against husband and wife, or either of them, as affected by the marriage relations; equitable actions generally.

FIRST: LEGAL ACTIONS.

§ 294. I. *Actions against Owners or Occupants of Lands.* This division does not include actions for trespass or other torts to the land or its possession, which will be considered under a subsequent subdivision relating to torts. The actions here intended must be brought against joint owners, owners in common, or occupants. The action to recover possession of land, and to try the title thereto, is generally called by lawyers and judges the action of ejectment. Yet wherever the new procedure is adopted, it far more nearly resembles in all of its essential features the ancient *real actions* which were displaced in use by "ejectment," — in its *essential* features, I say, for of course it has none of the technical peculiarities which marked those old common-law forms of proceeding. One fact is certainly true, namely, that it does not bear the slightest resemblance to the action of "ejectment," as that was contrived by the old judges and lawyers, and only confusion and misconception result from applying to it that name. Undoubtedly the courts have continued to connect with it some of the special rules and doctrines which belonged to the action of ejectment; but many of them, I am sure, could never have been retained if the courts had fully appreciated the completeness of the change wrought by the reformed system of procedure in abolishing all the forms of legal actions, and had reflected that the technical rules resulting alone from the absurd fictions which characterized ejectment have no legitimate connection with the simple action to recover possession of and try the title to land which has been introduced by the codes in the place of the former modes. As in the "real actions," the real party in interest, and that is the owner of the estate entitling him to possession, — whatever be its nature, — must be the plaintiff, and if the object be to establish a title, the holder or claimant of the adverse title must be made the defendant, while in respect of the claim to possession the occupant must be made a defendant. These are the simple essentials of the action, and they clearly have nothing in them akin to "ejectment." The codes of a few States contain express provisions in relation to parties defendant, and especially in relation to the union of the landlord and tenant as codefendants,¹ but

¹ Code of New York, § 118; California, §§ 879, 880; South Carolina, § 141; North Carolina, § 61.

these are rather inserted from an excess of caution, and do not add anything to the force of the more general clauses.

§ 295. In an action to recover possession of an entire tract or parcel of land, when the claim of the plaintiff to the whole rests upon and is derived through a single title, he may, and unless their occupation is distinct, should join all the actual occupants or tenants of the tract, even though they may be in possession of separate and distinct portions thereof, and may hold, possess, and claim under separate and distinct titles. In addition to these he may join the landlord or person holding the fee, or any person claiming the ownership and right of possession, and *must* join such person if he desires to establish in that action his own ultimate ownership against that claimant.¹ If the entire tract is in the possession of two or more persons who possess the same, not in separate portions, but jointly or in common in undivided shares, they should all be made defendants. If the plaintiff, however, claims separate portions of an entire tract under distinct titles, and each of these portions is possessed or occupied by a different person holding under a separate right or title from the others, he cannot join all these occupants in a single action; a suit must be brought to recover each portion against the occupant thereof; the mere fact of propinquity would not produce any community of interests. The foregoing propositions are sustained and illustrated in the following instances. In an action brought by a widow to recover dower (which had not been assigned) in a city lot of land and block of stores, the occupant, holding under a lease for one year, of a single floor of one store standing on a small portion of the entire tract, was held to be properly joined as a codefendant.² A similar action being brought to recover dower in a tract which the husband had conveyed during his marriage to a single grantee by one deed in which his wife did not join, and which land had by subsequent deeds been conveyed, one-half to one separate owner, and one-half to another, it was held that

¹ *State v. Orwig*, 34 Iowa, 112, 115.

² *Ellicott v. Mosier*, 7 N. Y. 201. This was so held under the 2 R. S. of New York, p. 303, §§ 2 and 4, and p. 304, §§ 10 and 13, which provide that ejectment must be brought against the person actually in occupation; citing *Sherwood v. Vandenburg*, 2 Hill, 303. The defendant had contended that, the action being for

dower, must be against the owner of the freehold, as in the common-law action of dower. In Missouri, when an action is brought to recover lands claimed to be owned in fee by a wife, her husband is the only proper party to be made defendant, since he is entitled to the possession. *Bledsoe v. Simms*, 58 Mo. 305.

the widow, being entitled to dower in the whole tract, might join both these owners of the fee, who were also the occupants, as defendants in the same action.¹ The rule is not confined to proceedings for the recovery of dower. Where it was alleged that one defendant claimed to be owner in fee of the whole premises, and that the three other defendants were his tenants, and that they all "unjustly withheld from the plaintiff the possession of the said premises," and it appeared on the trial that each of these four defendants actually occupied a separate portion, it was held that all these persons were properly united as codefendants in the action.² When the land is in the actual possession of a tenant, the landlord may be joined with him as a codefendant, independently of any express provision of the code authorizing such a course, if the landlord has in any manner interfered to resist the plaintiff's claim, or has aided and abetted the tenant in his resistance, or has asserted the right of ownership to be in himself as against the plaintiff.³

§ 296. Persons, however, whose rights cannot be at all affected by a recovery against the party in actual possession, whose interest is entirely distinct from his, and under or from whom he does not derive any title, are neither necessary nor proper codefendants with him in an action brought to recover the possession as against his special title; as, for example, the remainder-

¹ *Galbreath v. Gray*, 20 Ind. 290. It was held that the respective liabilities of the two defendants could be arranged and determined in the judgment.

² *Fosgate v. Herkimer Man. Co.*, 12 N. Y. 580. See *Fisher v. Hepburn*, 48 N. Y. 41, 55, per Earl J.

³ *Abeel v. Van Gelder*, 36 N. Y. 518. One S. was the tenant in possession, and Van G. was the landlord. The court, after reciting the facts that Van G. claimed to be the owner, that the entry was made, and the possession was retained by his command, that he asserted title in himself, and declared that possession should not be surrendered, proceeds, at p. 514: "This was certainly enough to constitute him a tortfeasor with his tenant, whose action he assumed to control. He knowingly and purposely took upon himself the burden of supporting his tenant's possession, and thus made the pos-

session his own; and, if wrongful, he was thus, with his tenant, responsible therefor," — citing *Fosgate v. Herkimer Man. Co.*, *supra*; *Pearce v. Ferris's Executors*, 10 N. Y. 280; *Fosgate v. Herkimer, &c. Co.*, 12 Barb. 852. This decision is not based upon the last clause of § 118 of the New York code. See also *Finnegan v. Carraher*, 47 N. Y. 498, which was very similar to *Abeel v. Van Gelder*, *supra*, in all the facts. The landlord alone was sued. Court held the tenant was also a proper and perhaps a necessary party, but objection to his nonjoinder had been waived by not demurring or answering. In Iowa, it is held that when the defendant is only a tenant, the landlord *may* be substituted; but this is not necessary. If substituted or notified, he is bound by the judgment; otherwise he is not. *State v. Orwig*, 34 Iowa, 112, 115.

man in fee after a life estate, when the action is merely for the purpose of recovering possession during the continuance of such life interest. Thus, in an action against a husband, tenant by the curtesy in actual possession, brought not to establish an absolute title in fee, but to recover the possession during the husband's life, the heirs of the deceased wife—who are the reversioners in fee—are neither necessary nor proper parties defendant.¹ On the same principle, an action by the grantee in a sheriff's deed of lands given on an execution sale, the judgment debtor having died, should be against the latter's heirs alone, and not against them and his widow; her dower right could not be affected by the recovery, and being as yet unassigned, it did not entitle her to possession as against the plaintiff.² Lands having been given to a tenant for life, with remainder in fee to another, the former leased the premises for a term of years, with a covenant of quiet enjoyment. The life tenant died before the expiration of the term, and the remainder-man thereupon entered and took possession. The lessee brought an action upon the broken covenant against both the executors of the life tenant and the remainder-man. The action in this form was plainly without any foundation; the remainder-man was improperly joined, as he was in no manner liable on the covenant.³

§ 297. II. *Actions against Owners or Possessors of Chattels.* The actions which fall under this subdivision, and which have any distinctive features, are very few in number. Those brought to recover damages for a tortious act, trespass, or negligence, committed by means of a chattel, and those brought to recover damages for the conversion of a chattel, properly belong to the subdivision which treats of actions for torts in general. The common-law rules as to parties defendant in an action to recover possession of chattels have not been in any manner affected by

¹ *Allen v. Ranson*, 44 Mo. 263.

² *Cavender v. Smith*, 8 Iowa, 360. If the dower had been assigned so that the widow was in actual possession of part of the land, her possession, as long as it continued, would, of course, have been under a title paramount to that of the plaintiff; and, although not yet assigned, she could establish her dower against the plaintiff after he had obtained possession of the entire tract in his action.

³ *Coakley v. Chamberlain*, 8 Abb. Pr. n. s. 37. The complaint was dismissed as to the remainder-man, and judgment was rendered against the executors. The action was in every respect remarkable. Where a lessee assigns his term, the lessor may join the lessee and the assignee in a suit for the rent. *Tabue v. McAdams*, 8 Bush, 74.

the new procedure. Such action must be brought against the party or parties in actual possession of the chattel demanded by the plaintiff. If this actual possession is in one, he must be the sole defendant; if in two or more jointly, — as, for example, in a partnership, — they must all be made defendants.¹ There is a particular case in which the action may be maintained against one in *constructive* possession, as well as against the party in actual possession.² If the original taking of the goods was wrongful, and the wrong-doer has subsequently parted with the possession by assignment, the action will still lie against him, or it may be prosecuted against both himself and the assignee whose possession is actual.³ Possession by the party, however, and not the claim of ultimate ownership, is in general the ground for making him a defendant. If the possessor is sued, and a third person also sets up a claim of title, the conflicting demands may be determined by means of an interpleader between the plaintiff and this claimant, ordered by the court at the instance of the defendant, if he in fact admits that he himself has no right in and to the goods.⁴

§ 298. The liability of ship-owners for supplies furnished or repairs made, or upon other contracts, express or implied, in respect to the vessel itself, gives rise to rules which properly fall under this subdivision. I do not now stop to inquire when, how, or by whom the owners may be bound, nor what are the powers of the master or other agent in managing the vessel. It is assumed that the power exists and has been properly exercised, and that a liability has arisen for the supplies, repairs, or other aid to the ship; and the single question is, What is the extent of the liability, upon whom does it rest, and against whom should it be enforced? When a liability has been created by the master or other agent for supplies furnished to the vessel, the part-owners

¹ Code of New York, § 207; Ohio, § 175; Indiana, § 129; Wisconsin, ch. 128, § 2; Minnesota, 2 Stats. at Large, p. 876, § 56; Missouri, art. 6, § 1; Iowa, § 8225; California, § 510; Oregon, § 181; Nebraska, § 182; Kansas, § 177; Florida, § 156; 1 Ch. Pl., pp. 122, 123 (Springfield ed., 1840).

² *Nichols v. Michaels*, 28 N. Y. 264, 270, 271. See *Haughton v. Newberry*, 69 N. C. 456.

³ *Nichols v. Michaels*, 28 N. Y. 264, 268, 270, 271, per James and Selden JJ.

⁴ See code of New York, § 122; Ohio, § 42; Indiana, § 23; Wisconsin, ch. 128, § 22; Minnesota, § 116; Iowa, § 2572; Kentucky, § 42; California, § 886; Kansas, § 48; Nebraska, § 48; Florida, § 77; South Carolina, § 145; North Carolina, § 65; Nevada, § 17; Oregon, § 89; Dacotah, § 75; Washington, § 12; Wyoming, § 47; Montana, § 19.

are responsible *in solido*, and should all be joined as defendants; the *nonjoinder* of some is a defence by those sued;¹ and the same is true in the case of repairs and of all other expenses properly incurred in sailing her.² An action to recover compensation in the nature of salvage for services rendered in saving and securing a disabled steamboat under circumstances entitling the plaintiff to such compensation, was held to be properly brought against all the persons and corporations who owned interests in the boat, even though their interests were distinct and unequal, and even though some of them were separate insurers of her by different policies, to whom an abandonment had been made on account of a total loss. Although their interests and their liabilities were unequal, they might all be sued in a single action, and a separate judgment could be rendered against each in proportion to his or its liability.³

§ 299. III. *Actions upon Contract: Joint Liability.* Notwithstanding the general intent of the codes — which, I think, is very plain — to substitute the equitable in place of the legal doctrines upon the subject of joint liability and of the necessary defendants in actions brought thereon, this intent has not guided the courts in the decision of the particular cases as they have arisen. The overwhelming weight of authority, in passing upon the subordinate and practical questions, has determined that no such change has actually been made, and that the common-law rules are left controlling in all legal actions.⁴ The only modification — and it is rather formal than real — seems to be in the manner of raising the questions. In an action against joint debtors, or to enforce a joint liability arising out of contract, all of the joint debtors or joint contractors that are living must be united as co-defendants; and a neglect to make such union of parties, if properly taken advantage of, will be fatal to the action. In other

¹ *Sager v. Nichols*, 1 Daly, 1.

² *Bassett v. Crowell*, 8 Robt. 72. Liability *in solido* means a joint liability, where all must be proceeded against, and the judgment is recovered against all, but may be fully enforced against either, and he left to his right of contribution, if any, against his fellows. In reference to the general doctrine stated in the text, consult *Smith's Mercantile Law*, pp. 237, 238 (Am. ed.), and *Abbott on Shipping*, pp. 116-118 (marg. pag.).

³ *Cloon v. City Ins. Co.*, 1 Handy, 82, per Gholson J., Superior Court of Cincinnati.

⁴ This general statement does not, of course, apply in those States whose codes expressly change the common-law rules in respect to joint debtors and joint liability upon contract, and expressly permit any number to be sued, and also the personal representatives of deceased joint debtors to be united with the survivors, &c. See *supra*, § 118.

words, the codes, in the absence of such express provisions as are found in those of a few States,¹ have not changed the nature of joint liability on contract, nor assimilated it to a several or joint and several one.² While this doctrine is generally accepted in the States which have adopted the reformed system of procedure, in a few of them, as has been said, the language of the statute is much more specific, and this language, it is held by the courts, substantially abolishes all joint debts and contract liabilities, and reduces them to joint and several liabilities; or, rather, it produces a still greater effect, for, as judicially interpreted, it permits the creditor to sue one, all, or any number he pleases, of the debtors or persons liable on the contract.³

§ 300. If one of two or more joint contractors is incapable of entering into a valid agreement, but all are sued jointly in one action, judgment may be recovered against those alone who are

¹ Namely, Kentucky, §§ 88, 89; Missouri, § 7; Iowa, § 2550; Kansas, § 89; North Carolina, § 68 a.

² *Bridge v. Payson*, 5 Sandf. 210; *Wooster v. Chamberlin*, 28 Barb. 602; *Tinkum v. O'Neale*, 5 Nev. 98; *Keller v. Bladel*, 1 Nev. 491; *Jenks v. Opp*, 48 Ind. 108, 110; *Kamm v. Harker*, 8 Oreg. 218; *Aylesworth v. Brown*, 81 Ind. 270; *Bledsoe v. Irvin*, 85 Ind. 298; *Hardy v. Blazer*, 29 Ind. 226; *Braxton v. State*, 25 Ind. 82; *Shafer v. Moriarty*, 46 Ind. 9, 13. See *Lane v. Salter*, 51 N. Y. 1. In *Bledsoe v. Irvin*, the court said that the decision there made did not conflict with the doctrine of *Goodnight v. Goar*, 80 Ind. 418, which was that "the code seems to have re-enacted the rules which prevailed in equity as to who must join as plaintiffs and may be joined as defendants," because, even in equity, such parties (joint debtors) must all be made defendants, and thus brought before the court; citing, in support of this equity rule, 1 Dan. Ch. Prac. 829. In *Shafer v. Moriarty*, 46 Ind. 9, 13, the doctrine was applied to the members of a corporation, who were made personally liable by the statute for certain debts of the company. But if the stockholders are each made liable in the amount of the stock held by them respectively, the liability is not joint, and each must be sued separately. *Perry v. Turner*, 55 Mo. 418. If one of two or more

joint debtors has been discharged in bankruptcy, he is still a necessary defendant, since his defence is personal, and must be specially pleaded. *Jenks v. Opp*, 48 Ind. 108, 110, 111.

³ This is the necessary effect of the provision in the code of each State referred to in the text, and named in note (1) last preceding; namely, *Kansas, Rose v. Williams*, 5 Kans. 483; *Board of Commissioners v. Swain*, 5 Kans. 876. An action may be brought on a joint note against one or more of the makers; and if all are sued, the plaintiff may dismiss as to any one or more, and take judgment against the others. *Whittemhall v. Korber*, 12 Kans. 618; *Alvey v. Wilson*, 9 Kans. 401, 405; *Silver v. Foster*, 9 Kans. 56, 59. *Iowa, Ryerson v. Hendrie*, 22 Iowa, 480, an action sustained against one of the partners upon a firm note; the opinion of Cole J. is a very full discussion of the doctrine and of the changes made by the new system,—an exceedingly instructive opinion, but too long for quotation. *Kentucky, Gossom v. Badgett*, 6 Bush, 97; *Nichols v. Burton*, 5 Bush, 820. This last case holds that a judgment against one partner on a firm debt extinguishes the demand, and is a bar to any subsequent action thereon against the other partners. This result is expressly guarded against by the codes of certain other States.

capable of contracting and of binding themselves thereby; as, for example, where a note had been given in a firm name, and the partners, who were husband and wife, were both sued, judgment would be given against the husband alone.¹ When a contract is made by a firm, all the persons who were then members of the partnership continue liable upon it, even though some of them may have retired from the firm before the contract was broken. No arrangement among the partners themselves can change their liability to their common creditor, unless he is a party thereto, and in some manner discharges an outgoing member from his responsibility. A suit, therefore, where there has been no such discharge, should be brought against all the persons who were partners at the time when the agreement was entered into or the indebtedness was incurred.²

§ 301. The rule which requires that all joint debtors must be made defendants, applies to the cases where the contract is implied, as well as to those in which it is express. Thus when two or more administrators, or an administrator and an administratrix, have been appointed over an estate, and upon their retainer services are rendered by a person for their benefit,—as, for example, by a lawyer retained to conduct legal proceedings affecting the estate,—they are jointly liable to him for his compensation, and should be sued jointly in an action to recover it; their different and even hostile interests in the final distribution do not alter the nature of their liability upon the contract, express or implied, made with the person thus employed.³ The case of persons liable to repay money which had been paid by mistake, is another familiar example of liability arising from implied contract; all the parties upon whom such duty rests should be joined in the suit to recover the money.⁴ The members of a

¹ *Brumskill v. James*, 11 N. Y. 294. See *Groat v. Phillips*, 6 N. Y. Sup. Ct. 42, where a wife who had joined in a contract was omitted in the action.

² *Briggs v. Briggs & Vose*, 16 N. Y. 471. The defendants, partners, made an express contract with plaintiff to receive from him a quantity of lumber, and to sell the same on commission; the lumber was delivered to and received by them. Before any sale, B., one of the partners, retired from the firm, and the business was thereafter conducted by V., who sold the lumber, and converted the proceeds to his

own use. This action, which was for the proceeds, was held properly brought against both, as they were jointly the contracting parties.

³ *Mygatt v. Wilcox*, 1 Lans. 55.

⁴ *Duncan v. Berlin*, 5 Robt. 457. In Kentucky, by statute, a surety who has paid the debt or a part thereof may sue the principal debtor and the co-surety in one action, and recover from the former the whole amount, and from the latter his contributory share. *Robinson v. Jennings*, 7 Bush, 680; 2 R. S. 896, ch. 97, § 7.

joint-stock association, not being a corporation, are jointly liable as partners for the debts and contracts of such association. Although the statute permits a creditor to sue the president or other managing officer, the judgment thus obtained can only be enforced out of the common property. If he desires to enforce his claim against the members individually, he must unite all of them as defendants, no matter how numerous, as in an action against an ordinary firm.¹ The apparent exception, which existed at the common law, to the general rule requiring all joint debtors to be sued, remains in full force under the new system, so that a dormant partner need not necessarily be included as a defendant in an action against the firm, although of course he *may* be so joined, if the plaintiff elect.²

§ 302. I am finally brought to the case where one or more of several joint debtors dies. The common-law rule had been settled from the earliest period that only the survivors could be sued. Equity had modified this legal doctrine, and permitted an action against the personal representatives of the deceased debtor or contractor. Has any change in this respect been introduced by the new procedure? It is now established by a great preponderance of authority, in those States whose codes do not contain the special provisions concerning joint liability already referred to,³ that these rules, as they existed immediately prior to the reform legislation, have not been in any manner modified, but remain in active operation as a part of the present system. The practical result is, upon the death of one or more joint debtors, obligors, or promisors, a legal action can be maintained against the survivors alone, and in such action the personal representatives of the deceased cannot be made defendants for any purpose. An equitable action, however, can be maintained against the administrators or executors of the deceased when, and only when, either the legal remedy against the survivors has been exhausted, or such remedy would be absolutely useless. In such equitable action, therefore, the plaintiff must either aver and prove the recovery of a judgment and the issue and the return of an execution thereon unsatisfied, against the survivors,

¹ *Kingsland v. Braisted*, 2 Lans. 17.

² *North v. Bloss*, 30 N. Y. 374; *Cook-ingham v. Lasher*, 2 Keyes, 454; *Hurlbut v. Post*, 1 Bosw. 28. Even when the dormant partner is the husband of the osten-

sible one. *Scott v. Conway*, 58 N. Y. 619.

³ See these provisions in the codes of Missouri, Kentucky, Iowa, Kansas, and North Carolina, *supra*, § 118.

or else that the survivors are utterly insolvent.¹ The rule thus established in New York and some other States differs from that prevailing in England in a single particular. The English Court of Chancery permits a suit against the personal representatives of the deceased at once, without attempting, much less exhausting any remedy at law against the survivor. In other words, the creditor has his option at all times to sue the survivors at law, or the representatives of the deceased in equity, whether the survivors are solvent or not; and this doctrine has been adopted in several American States.²

§ 303. These doctrines and modes of procedure in reference to the enforcing a joint demand when one debtor dies, have not, however, been accepted in all the States which have adopted the new system. In Indiana it is declared to be the true meaning and intent of the provisions of the code abolishing the distinctions between legal and equitable actions, and introducing the equitable principles concerning parties, and providing for a severance in the judgment, that upon the death of one or more joint, or joint

¹ Voorhis v. Childs's Executors, 17 N. Y. 354; Richter v. Poppenhausen, 42 N. Y. 878; Pope v. Cole, 55 N. Y. 124; Lane v. Doty, 4 Barb. 584; Voorhis v. Baxter, 1 Abb. Pr. 48; Morehouse v. Ballou, 16 Barb. 289, an action on a joint and several promissory note against one maker and the executor of the other, held improperly brought. Bentz v. Thurber, 1 N. Y. Sup. Ct. 645; Maples v. Geller, 1 Nev. 233, 237, 239; Fowler v. Houston, 1 Nev. 469, 472; Kimball v. Whitney, 15 Ind. 280, 283; Barlow v. Scott's Administrator, 12 Iowa, 68; Pecker v. Cannon, 11 Iowa, 20; Marsh v. Goodrell, 11 Iowa, 474; Williams v. Scott's Administrator, 11 Iowa, 475. The last four cases were all on joint and several notes, and it was held that the rule applied to them as well as to obligations purely joint. It should be observed that all these Iowa cases were decided prior to the "revision" of the statutes made in 1860. County of Wapello v. Bigham, 10 Iowa, 39; Childs v. Hyde, 10 Iowa, 294; People v. Jenkins, 17 Cal. 500; Humphreys v. Crane, 5 Cal. 178; May v. Hanson, 6 Cal. 642. But in Bank of Stockton v. Howland, 42 Cal. 129, an action against the survivors and the administrator of a deceased joint debtor

was held to be properly brought; the judgment, however, should be severed, and against the survivors should be *de bonis propriis*, and against the administrator *de bonis testatoris*. It was decided in Parker v. Jackson, 16 Barb. 33, per Gridley J., that an action could be maintained against the survivor and the personal representative of a deceased maker of a joint and several note, without alleging or proving the insolvency of the survivor. For the proceedings when the cause of action is for a tort, and survives upon the death of one of the wrong-doers, see Bond v. Smith, 6 N. Y. Sup. Ct. 239; and when the promise is joint and several, see Speyers v. Fisk, 6 N. Y. Sup. Ct. 197, and cases cited. When an execution against the survivors of joint debtors has been returned unsatisfied, the action against the personal representatives of the deceased debtor will lie, although it may turn out that the survivors were not insolvent. Pope v. Cole, 55 N. Y. 124.

² Wilkinson v. Henderson, 1 My. & K. 582; Braithwaite v. Britain, 1 Keen, 219; Brown v. Weatherby, 12 Sim. 6, 11. The survivors, however, should be made codefendants.

and several debtors or obligors, an action will lie at once against the survivors and the administrators or executors of the deceased.¹ In certain States, special provisions of the codes, or of other statutes, expressly authorize an action to be brought in the first instance against the survivors and the personal representatives of the deceased joint debtor, or even against some, any, or one of them, at the option of the plaintiff. Such statutory authority is found in Ohio,² Iowa,³ Kentucky,⁴ Missouri.⁵

¹ *Braxton v. The State*, 25 Ind. 82; *Eaton v. Burns*, 81 Ind. 890. The former of these cases is an able and instructive decision; the opinion presents the equitable theory of interpreting the code in a clear and convincing manner. The action was against three survivors and the administrators of the deceased obligors on a bond. After stating that there were no special provisions on the subject in the Indiana Code (as there are in some States), and after quoting the sections concerning forms of action and parties defendant, Elliott J. proceeds: "It was manifestly the intention of the legislature in the adoption of these provisions to afford as far as possible a simple and direct means of bringing all the parties having an interest in the controversy before the court, and of settling all their rights in a single litigation, and thereby to avoid a multiplicity of suits." It was further held that the bond, though in terms joint and several, was to be regarded as joint, because the plaintiff had elected to treat it as such. *Voorhis v. Child's Ex'ors*, *supra*, was expressly disapproved. In *Klussman v. Copeland*, 18 Ind. 306, the uniting the administrator of a deceased joint debtor as a codefendant with the survivor was declared not to be necessary. When a bond had been executed by a guardian and his surety, and the surety had died, the action on the bond may be brought in

Indiana against the surviving principal and the heirs of the deceased obligor, the latter being liable of course to the extent of the lands descended to them. *Voris v. State*, *ex rel. Davis*, 47 Ind. 845, 849, 850; and an action may be maintained on an administrator's bond against the surviving principal—the administrator—and the executor of a deceased surety. The bond was assumed to be joint, and the judgment was against both defendants *in solido* for the full amount. *Myers v. State*, *ex rel.*; *McCray*, 47 Ind. 298, 297; citing and following *Braxton v. State*, *supra*, and *Owen v. State*, 25 Ind. 107.

² *Burgoyne v. Ohio Life Ins. & T. Co.*, 5 Ohio St. 586, 587. This was an action against the surviving makers and the administrator of a deceased maker of a promissory note. Ranney C. J., after stating the original common-law rule, and quoting a statute of Ohio (Swann's R. S. p. 378) as follows,—"When two or more persons shall be indebted on a joint contract or upon a judgment founded upon any such contract, and either of them shall die, his estate shall be liable therefor as if the contract had been joint and several, or as if the judgment had been against him alone,"—proceeds (p. 587): "This statute effected an entire abrogation of the common-law principle to which allusion has been made, and left the estate of the joint debtor liable to every legal

³ Code of Iowa, § 2550. See *supra*, § 118. *Sellon v. Braden*, 18 Iowa, 365. This was an ordinary legal action against the administrator of a deceased joint obligor, the survivor living. The court, after quoting § 2764 of the code of 1860 (which is the same as § 2550 of the present code), and after showing that a suit in equity could have been maintained prior

to and independently of this statute, added: "We see no reason, therefore, for turning the plaintiff over to his remedy in equity, when that remedy, by a change of statute, has been so modified as to enable the plaintiff to avail himself of it at law."

⁴ Code of Kentucky, § 39, *supra*, § 118.

⁵ Code of Missouri, § 7, *supra*, § 118.

§ 304. Although the interpretation put upon the codes in reference to this particular subject by the courts of New York and of many other States, is clearly established by an overwhelming weight of authority, I do not hesitate to say that it is as plainly opposed to the obvious intent, and even to the very letter of the reform legislation. When the statute has in express terms abolished all distinctions between actions at law and suits in equity, has declared that in all cases any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved, and has finally authorized a several judgment to be rendered in any action, it is simply a palpable violation of these positive provisions to say that a creditor shall not maintain a legal action against the personal representatives of a deceased joint debtor, but shall be driven to an equitable suit, and that only in a certain contingency; it is a useless sacrifice to the merest form. I would not be understood by this criticism as denying the existence of the rule, for it is too well settled to be doubted. If, however, the courts shall at any time accept the intent of the legislatures, as it is plainly shown in their statutory work, and shall adopt a general equitable theory of interpretation, which shall be applied in all cases to all actions without reservation or exception, so that there shall result one single and uniform system of procedure, then without doubt the rule that I am criticising will be abandoned, and the conclusions reached by the Indiana courts will be accepted in all the States.

§ 305. IV. *Actions upon Contract: Joint and several liability.*

remedy as fully as though the contract had been joint and several. Until the passage of the act to establish a code of civil procedure, it is true his personal representatives and the survivors could not be sued in the same action. But by the 38th section of that act it is provided that 'persons severally liable on the same obligation or instrument may all or any of them be included in the same action at the option of the plaintiff.' And the 371st section allows a several judgment to be given against any one of the defendants as the nature of the case may require. In the opinion of the court, these

sections permit the joinder of the survivor or survivors and the personal representatives of the deceased obligor in the same action, whether the contract is in terms joint and several, or is made so by the 90th section of the administration statute upon the death of the joint obligor, and authorize a separate judgment against each according to the nature of their respective liabilities." The construction here put upon the Ohio statutes is certainly far more equitable, and in accordance with their intent, than that put upon the code of New York.

The former doctrine of the common law concerning joint and several contracts and suits thereon, has not been affected by the new procedure, except in those few States, already referred to, whose codes or statutes permit the creditor in all cases to sue all, or any, or one of the debtors or co-contractors. The general language found in most of the codes has wrought no change in the practical rules. This proposition is sustained by many of the cases in reference to joint liability, cited under the foregoing paragraphs; it is also recognized or distinctly affirmed in many particular instances, among which I mention a few. Two insurance companies had insured a building by separate policies, each of which contained the usual rebuilding clause. Upon the occurrence of a fire, they united in a joint notice of their election to rebuild, and partly completed the work under such notice. Default being made by them, the owner brought an action against one of them to recover damages for the non-performance of the contract to rebuild. It was held that by the election the companies had turned their policies into building contracts, and were liable according to the terms thereof, and that the owner might sue both in a joint action, or either in a separate action; in other words, that their liability was joint and several.¹ Premises were leased with covenants against under-letting, and against using the building for certain purposes. The lessee sub-let portions to different under-tenants, who violated the covenants by using them in the prohibited manner. An action against all,—the lessee and the sub-tenants,—to recover damages for the breach of the covenants, was held proper, although it was said the plaintiff must have a separate judgment against each defendant for the special injury and wrong done by him. A separate action might also have been brought against the original lessee and each of the under-tenants.² When an express joint and several note is made by a firm, and is signed by the firm name, it retains its joint and several character; an action may be brought either against all the partners, or against each or one of them.³ In certain States, as has already been mentioned, the express language of the codes

¹ *Morrell v. Irving Fire Ins. Co.*, 38 N. Y. 429.

² *Gillilan v. Norton*, 6 Robt. 546. The ruling of the court in respect to a separate judgment was based upon § 274 of the New York code. The entire decision is

in closer harmony with the plain intent of the code than many others which have been cited. See *Trabue v. McAdams*, 8 Bush, 74.

³ *Snow v. Howard*, 35 Barb. 55.

permits an action against any number of joint and several debtors at the plaintiff's option, as well as against any number of joint debtors.¹ If several defendants are sued jointly upon an alleged joint and several contract, the plaintiff may sever in the recovery, and take judgment against a portion only if the evidence shows such a liability; and when one of two or more persons jointly and severally liable dies, the creditor may at once sue the personal representatives of the deceased in a separate action, or may sue the survivors.²

§ 306. V. *Actions upon Contract: Several liability.* No change has been made in the common-law doctrines and rules concerning several liability arising from contract, except that produced by the provision found in all the codes in substance as follows. Persons severally liable on the same obligation or instrument, including the parties to bills of exchange, promissory notes, and negotiable bonds,—and in some States, sureties,—may all, or any of them, be included in the same action at the option of the plaintiff. This clause certainly effects a very important change in the ancient rule, in all cases where the liability flows from an instrument or contract in writing, in that it permits a creditor to sue *all* the several promisors or any number of them, instead of restricting him to a separate action against each.³ The effect of this clause, and the extent of the change wrought by it, will be discussed at large in Section IX. of the present chapter. With this exception, the common-law doctrine is unaltered. In many States it is settled by a decided preponderance of authority, that a principal debtor and a guarantor thereof cannot be joined as codefendants in the same action. Even when the principal debt is evidenced by a written instrument, and the guaranty is indorsed upon the same paper, the parties are not “severally liable on the same obligation or instrument,” and do not fall within the provision last above quoted. A separate action must be brought against the principal debtor and against the individual guarantor.⁴

¹ *Rose v. Williams*, 5 Kans. 483; *Board of Commissioners v. Swain*, 5 Kans. 376; *Kupfer v. Sponhorst*, 1 Kans. 75; *Rose v. Madden*, 1 Kans. 445; *Sellon v. Braden*, 18 Iowa, 365; *Ryerson v. Hendrie*, 22 Iowa, 480; *Clapp v. Preston*, 15 Wisc. 643. This last case arose under a provision identical with § 120 of the New York code as to parties severally liable on the same instrument; and see *Powell v. Powell*, 48 Cal. 234.

² *Speyers v. Fisk*, 6 N. Y. Sup. Ct. 197; *Parker v. Jackson*, 16 Barb. 33; *McIntosh v. Ensign*, 28 N. Y. 169; *Harrington v. Higham*, 15 Barb. 524.

³ See *Powell v. Powell*, 48 Cal. 234.

⁴ *Le Roy v. Shaw*, 2 Duer, 626; *De Ridder v. Schernierhorn*, 10 Barb. 638;

This doctrine does not prevail in all the States. It is held in some, by very able courts, that where the payee or owner of a promissory note transfers the same, and writes a guaranty upon it, he may be sued as a guarantor, together with the maker thereof, in one action; and the same doctrine has been applied to a similar transfer and guaranty of a contract to pay money not negotiable in form.¹ In an ordinary action to recover upon a debt due by an insolvent corporation, over which a receiver has been appointed, he is not a necessary, nor even proper codefendant when no cause of action is stated, and no relief is prayed against him.²

§ 307. VI. *Actions for Torts.* The common-law doctrines concerning the liability of tort-feasors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure. It is unnecessary to repeat these ancient rules, since they were fully stated in the former part of this section;³ that they are still in operation with their full force and effect, is sufficiently shown by the following particular instances. In general, those who have united in the commission of a tort to the person or to property, whether the injury be done by force or be the result of negligence or want of skill, or of fraud and deceit, are liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed. He may, at his option, sue all the wrong-doers in a single action, or may sue any one, or may sue each in a separate action, or may sue any number he pleases less than all; the fullest liberty is given him in this respect. The only exceptions are those few instances in which the tort from its very nature must be a separate act impossible to be committed by two or more jointly.⁴ A sheriff and his deputy

Allen v. Fosgate, 11 How. Pr. 218; Phalen v. Dingee, 4 E. D. Smith, 379; Bondurant v. Bladep, 19 Ind. 160; Virden v. Ellsworth, 15 Ind. 144. See Stout v. Noteman, 30 Iowa, 414, 415; Tucker v. Shiner, 24 Iowa, 384.

¹ Marvin v. Adamson, 11 Iowa, 371; Mix v. Fairchild, 12 Iowa, 351; Tucker v. Shiner, 24 Iowa, 384; Peddicord v. Whittam, 9 Iowa, 471. It is to be noticed that in each one of these cases the guarantor was the original payee or promisee, and also the assignor; but it must be said

that the court does not lay any stress upon this fact as a ground for its decision.

² Arnold v. Suffolk Bank, 27 Barb. 424.

³ See *supra*, §§ 281, 282.

⁴ Creed v. Hartman, 29 N. Y. 591, 592, 597; Roberts v. Johnson, 58 N. Y. 613, 616, an action against one partner only where the entire firm had been guilty of negligence; Chester v. Dickerson, 52 Barb. 349, 358; Phelps v. Wait, 30 N. Y. 78, an action against principal and agent

may be sued jointly for the trespasses and other wrongful acts done by the latter in his official capacity; the deputy, because he actually commits the tort, and the sheriff, because he is the principal.¹ A passenger in the cars of one company was injured by a collision with a train of another company which used the same track. The servants of both companies were in fault, and as the wrong was caused by the negligence of each corporation, an action brought against them jointly was sustained.²

§ 308. In order, however, that the general rule thus stated should apply, and a union of wrong-doers in one action should be possible, there must be some *community* in the wrong-doing among the parties who are to be united as codefendants; the injury must in some sense be their *joint* work. It is not enough that the injured party has on certain grounds a cause of action against one, for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application.³

for negligence of the agent; *Kasson v. People*, 44 Barb. 847; *Wood v. Luscomb*, 23 Wisc. 287, an action against one partner for negligence by the firm; *Fay v. Davidson*, 18 Minn. 523; *Mandlebaum v. Russell*, 4 Nev. 561; *McReady v. Rogers*, 1 Neb. 124; *Murphy v. Wilson*, 44 Mo. 813; *Allred v. Bray*, 41 Mo. 484; *Brady v. Ball*, 14 Ind. 317, action for injury done by trespassing animals which belonged to several persons jointly; *Turner v. Hitchcock*, 20 Iowa, 810, a very elaborate and instructive judgment; *Buckles v. Lambert*, 4 Metc. (Ky.) 330; *Hubbell v. Meigs*, 50 N. Y. 480, 489; *McIntosh v. Ensign*, 28 N. Y. 169; *Bullis v. Montgomery*, 50 N. Y. 862. Where a right of action for tort exists against several, and is of such a character that it survives upon the death of the wrong-doer, if one of the persons liable dies, the action may be brought or continued against his personal representatives; but it is the settled rule in New York that the action in such case must be divided, and one suit be brought or continued against the survivors, and one against the representatives of the de-

ceased. *Bond v. Smith*, 6 N. Y. Sup. Ct. 289; *Heinmuller v. Gray*, 18 Abb. Pr. n. s. 299; *Union Bank v. Mott*, 27 N. Y. 638; *Gardner v. Walker*, 22 How. Pr. 405; *McVean v. Scott*, 46 Barb. 379.

¹ *Waterbury v. Westervelt*, 9 N. Y. 598; *King v. Orser*, 4 Duer, 431; *contra*, *Moulton v. Norton*, 5 Barb. 286, 296, per Pratt J. This dictum is clearly erroneous.

² *Colegrove v. N. Y. & N. H. R. R.*, 20 N. Y. 492; *Mooney v. Hudson River R. R.*, 5 Robt. 548.

³ *Trowbridge v. Forepaugh*, 14 Minn. 138. F., owning a lot in St. Paul abutting on a street, dug and left open a dangerous hole in the street, into which the plaintiff fell. He sues the city and F. jointly, basing his claim upon the above acts of F., and upon the general duty of the city in respect of its streets. The court held that such a joint action could not be maintained. "The liability of the city depends on a state of facts not affecting its codefendant, and the converse is equally true. Neither is, in fact nor in law, chargeable with

§ 309. The general doctrine under examination embraces as well the case of a joint conversion of chattels, as any other instance of joint tort to property or person. When two or more have united in the act which amounts to a conversion, or have so interfered with the chattel as to constitute a conversion within the legal meaning of the term, the owner or person having the special property may sue all or one or any, as in the case of any other tort. But there must be a community in the wrong-doing; the wrongful act must constitute a conversion *on the part of all*, and in that act all must have engaged. When such is the case, the law does not apportion the responsibility, but holds each liable for the whole amount. If there is no such community, a joint action for the conversion will not lie, and, *a fortiori*, it will not lie when the defendants have not each been guilty of an act which is a wrongful conversion.¹

§ 310. The same general doctrine, under the same limitations, controls the action of replevin, or detinue,—or to recover possession of chattels, which at the common law was regarded as a personal action based upon the tortious act of the defendant, in his wrongful detention or taking of the goods. If, therefore, there is a joint wrongful taking or detention of the

nor liable for, the matter set up as a cause of action against the other. They did not *jointly* conduce to the injury."

¹ *Manning v. Monaghan*, 28 N. Y. 539. Plaintiff was the mortgagee of chattels, the mortgagor being entitled to and being in possession during the year the mortgage had to run. Defendant Monaghan recovered a judgment against the mortgagor, upon which supplementary proceedings were instituted, and defendant C. was appointed receiver therein. He took the goods from the mortgagor before the year expired, and sold them at auction without notice of the plaintiff's mortgage lien, and purporting to sell them free from any claim. One parcel was sold to defendant G. After the expiration of the year, plaintiff demanded this parcel from G., and upon refusal, he brought this action against Monaghan the judgment creditor, C. the receiver, and G. the purchaser, for a conversion, claiming from the first two the whole value of the goods, and from G. the value of the parcel bought by him. Judgment was recovered against all,

which was reversed by the Court of Appeals; but the judges who united in the decision did not unite in any reasons therefor; and nothing was determined by the court. On the new trial, the action was discontinued as to G., and judgment was again recovered against the other two for the value of the goods. This judgment was again reversed by the Court of Appeals, which, on the second appeal, definitively held that M. and C. were not trespassers, and had not converted the plaintiff's goods. If they were liable at all, it would be in a special action for damages for injury to the plaintiff's reversionary interest. See s. c. 28 N. Y. 585. This final decision was put on the ground that, at the time of the acts done by defendants, the plaintiff had no property in the goods entitling him to the possession thereof. If the mortgage was then due, and there had been default, or if the plaintiff had been entitled to possession, the action might perhaps have been maintainable.

goods, the action will lie against the wrong-doers jointly, although one of them may have parted with his actual possession. Thus, where goods had been sold and delivered to a fraudulent vendee, so that the vendor might rescind and retake the chattels, and this vendee had afterwards assigned them to an assignee in trust for creditors, and the possession had actually been transferred to such trustee, an action by the vendor to recover the possession of the goods was held to be properly brought against both jointly, the assignee not being a purchaser for value.¹

§ 311. The common-law doctrines relating to suits against common carriers are unaltered. Although an action may be brought upon their contract express or implied to carry the goods safely, yet the ultimate ground of their liability is their general duty, the violation of which is a tort. The usual form of the action under the old system was *Case* and not *Assumpsit*. The owner of goods that have been lost or damaged in the carriage, may therefore treat the default as a tort, and sue all or any of the parties at his election.²

§ 312. A joint liability for an injury may arise from the ownership and occupancy of real property. As an example, where the owner of a house had constructed a coal-hole in the sidewalk in such a manner and position as to be dangerous to passers, and had leased the premises to a tenant who used the coal-hole, and a person passing on the sidewalk had fallen into it and been injured, both the owner and the tenant were held liable, and a joint action against them was sustained.³ In general, the principal and his agent may be sued jointly for any trespass or other wrongful act done by the agent while acting within the scope of his employment. The agent is personally responsible, because his employment will not shield him from the consequences of his torts, and the principal

¹ *Nichols v. Michaels*, 28 N. Y. 264. See, especially, the opinions of James J., p. 268 *et seq.*, and of Selden J., pp. 270, 271, where the nature of the action before and since the code is discussed at length.

² *McIntosh v. Ensign*, 28 N. Y. 169. This case does not directly decide the point stated in the text; for the action was nominally against all the parties, — five in number, — while two only were actually served with process, and judgment was recovered against them alone.

Although the court rather treated the action as based on contract, and discussed the question, whether in such a case the judgment could be severed, yet the principle of the text was recognized; and there is no pretence that the well-settled common-law rule has been changed.

³ *Irvin v. Wood*, 4 Robt. 188, 5 Robt. 482; s. c. on appeal, 51 N. Y. 224, 230. But see *Trowbridge v. Forepaugh*, 14 Minn. 133, *supra*, § 308 (n.).

is liable upon the familiar doctrine of agency. The injured party may of course sue either separately.¹

§ 313. It has already been said that the general doctrine of the joint and several nature of the liability springing from torts does not obtain in those cases where the injury is essentially a several one, or where, in other words, from its intrinsic character it can only be committed by one person. The most important of this class of torts is slander. No joint action for slander is possible; but such an action can be maintained for the publication of a libel, as in the very familiar and frequent instance of a newspaper, which contains defamatory matter, being owned and published by a partnership.² In the same manner a joint action to recover damages for a malicious prosecution, which is an injury to character, may beyond doubt be brought against two or more persons who united in promoting the judicial proceeding complained of.

§ 314. Although in cases of joint torts the law gives the injured party a wide choice to sue all the wrong-doers, or any number, in a single action, or to sue each of them separately, thus bringing as many actions as there are persons, yet it does not permit him thereby to multiply his damages. He can have but one satisfaction. In short, he can collect but one amount of damages out of the many that may have been awarded him in separate actions, although he is entitled to the costs in each suit.³ If he has prosecuted two or more jointly, and the jury has assessed a different sum as damages against each defendant, the plaintiff may enter the judgment against all for either of these amounts which he elects, and of course he would naturally choose the largest. This rule is based upon the notion that the injury is a

¹ *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Wilcox*, 19 Wend. 343; *Montfort v. Hughes*, 3 E. D. Smith, 591, 594; *Suydam v. Moore*, 8 Barb. 358; *Hewett v. Swift*, 10 Am. Law Reg. 505. When damage is caused by the negligence of a servant of a firm, all or any number of the partners may be sued. *Roberts v. Johnson*, 58 N. Y. 618, 616.

² *Forryth v. Edmiston*, 2 Abb. Pr. 480. A *quære* is suggested, whether an action for slander may not be maintained against several persons, if the defamatory words are uttered in pursuance and as the result

of a conspiracy among them. This, perhaps, may be possible.

³ This doctrine is not confined to cases of tort; it applies in all instances where there have been separate suits or recoveries against persons who are jointly and severally liable on the same obligation; satisfaction of one is satisfaction of all, except as to costs; and if some of the actions are pending, payment of one may be pleaded in bar of such pending suits. *First National Bank v. Indianapolis, &c. Co.*, 45 Ind. 5.

unit, that one award of damages is a compensation for that injury, and that the defendants are equally responsible as among themselves. A satisfaction of one is therefore operative as to all. Imprisonment under a body execution is regarded by the law as *pro tanto* a satisfaction; ¹ and if one such judgment debtor, being in imprisonment, is voluntarily discharged therefrom by the creditor, the judgment or judgments against all the others are *ipso facto* satisfied, even though rendered in separate actions, as fully as though the discharge had been by payment.²

§ 315. VII. *Actions—generally founded upon statutes—in the Settlement of Deceased Persons' Estates.* In many if not all States, actions are authorized by statute, in the matter of settling the estates of deceased persons, which were unknown at the common law, as, for example, an action by a legatee to recover his legacy. It is not within my purpose to inquire when such actions may be brought, but simply to ascertain what special rules, if any, have been laid down in reference to the proper parties therein. A statute of New York requires the heirs of an intestate who have

¹ Koenig v. Steckel, 58 N. Y. 475.

² Kasson v. The People, 44 Barb. 347.

The plaintiff had obtained a judgment against G. and one against R. in a separate action against each for a joint trespass. G. was taken on body execution, and, while in custody, was voluntarily set at liberty by the judgment creditor. The plaintiff afterwards took the other defendant, R., on a body execution in his action. R. applied to a judge by *habeas corpus*, and was discharged. The General Term, on appeal, held this discharge regular, and laid down the doctrines stated in the text. See also McReady v. Rogers, 1 Neb. 124; Turner v. Hitchcock, 20 Iowa, 810. The latter case was very extraordinary. The action was for a trespass, and was against six women and their husbands; and one Johnson was a defendant. The petition alleged that a party of women, of whom the female defendants were a portion, made a raid upon the plaintiff's saloon, destroying property therein. The defendants, except Johnson, answered, among other defences, that, since the action was brought, the plaintiff had released the defendant Johnson; also that one Almira C. was one of the joint trespassers; and, before the action was

brought, the plaintiff and she had intermarried, and were then husband and wife. On the trial, it was proved that plaintiff had released Johnson, but that she had taken no part in the trespasses, and was not liable therefor. The other defence was proved exactly as alleged. Upon these facts, the court held that the release of Johnson did not discharge the other defendants, because she was not, in fact, a joint trespasser. On the second defence, Dillon J., after stating the common-law rules concerning joint trespassers, reached the following conclusions: That the code had not changed these former rules; that separate actions may be brought, separate verdicts given, and judgments rendered, but only one satisfaction; that the release of one joint wrong-doer discharges all; and, finally, that the marriage of one with the plaintiff operated as a release and discharge. On this last point the court were equally divided; but they were agreed upon all the other propositions of Judge Dillon's opinion. The case, as a whole, is very instructive, and contains a full discussion of the doctrines concerning joint torts, and a review of all the leading authorities.

inherited lands under certain specified circumstances, to be sued jointly and not separately for a debt due from the deceased, the land in their hands being regarded as a fund upon which the debt is chargeable and out of which it is to be paid. It has been held that this statute does not make the heirs jointly liable as *joint debtors*, but that it merely prescribes a mode of enforcing the demand out of assets which have descended to them.¹ In an action by a residuary legatee against the executor to recover the amount claimed to have been given by the will, all persons interested in the residue must be joined as codefendants with the executor, and if a legacy is charged upon lands, the devisees must also be made parties.² When a creditor seeks to recover his demand against the estate, his suit should be prosecuted against the executor or administrator alone; the widow, heirs, legatees, next of kin, and creditors, are neither necessary nor proper parties defendant. This was the universal rule under the former system; and although the code has enacted the equitable doctrines concerning parties, and has made no exception in their application to different actions, it has not changed the procedure in this particular. The administrator or executor represents the estate; is a trustee for all the parties who are interested in its distribution; and his defence is their defence. He is bound to interpose all necessary and available answers to demands made upon the estate, and the law presumes that he will faithfully perform this duty. The general language of the codes certainly does not require a greater latitude in the admission of parties defendant who are interested in the event of the suit than was demanded by the practice of the equity courts. It has not therefore been so construed as to make the widow, heirs, legatees, and others necessary or proper defendants, although they may seem to be interested in the result of the controversy.³ The same is

¹ New York Laws of 1837, p. 587, § 73; Kellogg v. Olmsted, 6 How. Pr. 487.

² Tonnelle v. Hall, 8 Abb. Pr. 205. Such an action, although it may be authorized by statute, is in all its features equitable; and the equity rules as to parties must control it. See Towner v. Tooley, 38 Barb. 598, as to the necessary defendants in an action upon an administration bond by legatees whose legacies

are charged upon the lands of the deceased.

³ Nelson v. Hart, 8 Ind. 298, 295. The action was by a creditor to recover a debt due from the decedent. He had made not only the administrator but the widow and next of kin defendants. The court say: "It is true, a judgment for the plaintiff must be paid out of property which would otherwise go to the widow or heirs; hence they would seem to be interested in the

true even when the testator has bequeathed all his property, real and personal, to a single legatee; the creditor must pursue his claim against the executor and not against the legatee.¹ Although, in general, an action to recover a debt or demand due to the estate must be brought by the administrator or executor alone, yet in some exceptional instances such suit may be instituted and prosecuted by a legatee or distributee, when the administrator or executor is incapacitated from suing.²

§ 316. VIII. *Some Special Actions not included in either of the foregoing classes.* In New York, an action against a county should be brought against "The Board of Supervisors" of the specified county, and not against the supervisors individually or by name.³ A suit may be maintained between two firms having a common partner, he being made a defendant, and suitable averments being inserted in the complaint or petition.⁴ Where a particular religious society or individual church is incorporated, an action to recover a debt or damages for the breach of a contract due from it must be brought against this corporation, and not against the bishop or priest, whatever may be the ecclesiastical powers and authority of such clerical officers.⁵ In certain States the assignor of a non-negotiable thing in action, or where

result of the controversy. But the subject-matter of this suit is simply a claim against the decedent's estate; and the administrator who represents their interest in the estate is in duty bound to make all necessary defences against the claimant's demand. His defence is their defence. We are not inclined to adopt such a construction as will allow each creditor of an estate, in the prosecution of his claim against its administrator, to join as defendants the widow and heirs." See also *Stanford v. Stanford*, 42 Ind. 485, 488, 489. In an action against the sureties on an administrator's bond, he himself being dead, his administrator is not a necessary defendant, and the next of kin of the original decedent are not proper defendants. *Flack v. Dawson*, 69 N. C. 42. If one of two executors dies, and an action is brought against his personal representative to recover a demand against the original estate, the surviving executor must be made a codefendant. *McDowell v. Clark*, 68 N. C. 118, 120.

¹ *Perry v. Seitz*, 2 Duv. (Ky.) 122. The creditor sued the widow, alleging that the deceased had given to her all his property, and praying judgment to be enforced against the assets in her hands. The action was held improper. Such an action would be permitted by the statutes of some States if the executor had settled the estate, and the claim had not been presented to him within the period prescribed by law.

² See *Fisher v. Hubbell*, 1 N. Y. Sup. Ct. 97; s. c. 65 Barb. 74; 7 Lans. 481; *Lancaster v. Gould*, 46 Ind. 397.

³ *Hill v. Board of Supervisors*, 12 N. Y. 52.

⁴ *Cole v. Reynolds*, 18 N. Y. 74; *Englis v. Furniss*, 4 E. D. Smith, 587.

⁵ *Charboneau v. Henni*, 24 Wisc. 250. A peculiar case. The action was against a Roman Catholic bishop, to recover the cost of building a church edifice belonging to a religious society.

the assignment is not expressly authorized by statute, is a necessary defendant in an action brought by the assignee.¹

§ 317. In the case of a substitution of one party for another as a debtor, — that is, when a debt being due from one person, another for a valuable consideration assumes such indebtedness and promises to pay the same, — it has been decided in Indiana that the creditor may maintain an action against the substituted debtor, but must join with him the original debtor as a codefendant, under the general provision of the code requiring or permitting all persons to be made defendants who are necessary parties to a complete determination and settlement of the questions involved.² In this decision the court has accepted to its full extent the equitable theory of parties, and has applied it unreservedly to a purely legal action; for since the creditor had surrendered all claim upon the original debtor, he could recover no judgment in the action against such debtor, and the latter's presence could only be necessary for his own protection and that of the other defendant. It is probable that this ruling would not be followed by those courts which have partially or wholly confined the operation of the statutory provisions in question to equitable actions. When the stockholders of a corporation are by statute made personally responsible for an amount equal to the amount of stock held by them, the liability is not joint, and each must be sued separately.³

¹ *Harvey v. Wilson*, 44 Ind. 231, 234; *Allen v. Jerauld*, 81 Ind. 872; *Indiana, &c. R. R. v. McKernan*, 24 Ind. 62; *Holdridge v. Sweet*, 23 Ind. 118; *French v. Turner*, 15 Ind. 59; *Gower v. Howe*, 20 Ind. 396. When a negotiable promissory note is indorsed and transferred, it carries with it the title to a mortgage given as security, so that the assignor — the mortgagee — is not a necessary defendant in a foreclosure suit. *Bondurant v. Bladen*, 19 Ind. 160; *Nelson v. Johnson*, 18 Ind. 329; *Hubbell v. Skiles*, 16 Ind. 188; *Hopkins v. Organ*, 15 Ind. 188; *Perry v. Seitz*, 2 Duv. (Ky.) 122; *Lytle v. Lytle*, 2 Metc. (Ky.) 127; *Gill v. Johnson's Administrators*, 1 Metc. (Ky.) 649. See *Shane v. Lowry*, 48 Ind. 205, 206; *Strong*

v. Downing, 84 Ind. 800. This rule has been extended to cases not expressly within its terms. Thus, where a firm G. & Co. were indebted to the plaintiff on certain notes, and one D. made a contract in writing with the firm by which he agreed in general terms to assume and pay all their debts, and the plaintiff relying on this contract sued D. to recover the amount of such notes, it was held, upon D.'s objection, that the members of the firm were necessary defendants to protect D.'s interests. *Durham v. Bischof*, 47 Ind. 211; *S. P. Hardy v. Blazer*, 29 Ind. 226.

² *Hardy v. Blazer*, 29 Ind. 226.

³ *Perry v. Turner*, 55 Mo. 418.

SECOND. ACTIONS AGAINST HUSBAND AND WIFE OR EITHER OF THEM: PARTIES DEFENDANT AS AFFECTED BY THE MARRIAGE RELATION.

§ 318. The provisions of the codes, and of other statutes, in relation to actions in which married women are parties, were quoted in full in the last preceding section, and need not be repeated here.¹ There is a marked difference in the extent of the alterations made in the former law by the legislation of the various States. The changes in New York are the most complete and radical, the wife being in almost every respect assimilated to the unmarried woman. The example of New York is followed by a few States. In most of them, however, the modifications do not go to any such extent, and are confined to the cases in which married women are sued or sue in respect of their separate property, and those in which the action is directly between the husband and wife, leaving all others to be controlled by the prior law. We saw in the preceding section that in most of the States where a right of action exists on account of a tort committed to the person of a married woman, the common-law rules are unchanged, and the action must be either in the name of the husband alone, or of the husband and wife jointly; while in New York, and in the few States which have copied its legislation, the wife is permitted to sue in her own name in respect of any cause of action accruing to herself. There is even less modification of the ancient doctrines which regulate the form of suits *against* the wife for her torts, frauds, and other wrongful acts. The legislation of New York, and I believe of every other State, is silent upon this particular subject, and the matter is thus left entirely as it existed at the common law.

§ 319. The result is that in actions which concern her separate property, the wife *may* or *must* be sued alone, either with or without a next friend. In those States which permit her to enter into contracts having reference to her separate property, or connected with a business or trade which she may carry on, suits upon such contracts may or must be brought against her individually; while actions to recover damages for personal torts committed by her must be instituted against her and her husband

¹ See *supra*, § 286, where the statutory provisions embracing the cases of plaintiffs and of defendants will be found in full.

jointly, or in certain exceptional cases solely against the husband. These propositions, which are the general summing up of the statutory provisions, and of the-judicial interpretation thereof, I shall now illustrate by particular instances which will embrace all the important questions that arise.

§ 320. It is the settled rule in all the States which have adopted the reformed system of procedure, that, in actions to recover damages for all torts whether with or without violence, negligences, frauds, deceits, and other such wrongs done by the wife personally, and not done merely by or by the use of her separate property, the common-law principle is unaltered, and the husband and wife must be joined as codefendants.¹ The principle thus

¹ *Anderson v. Hill*, 53 Barb. 238, assault and battery by the wife; *Peak v. Lemon*, 1 Lans. 296, conversion; *Tait v. Culbertson*, 57 Barb. 9, libel by the wife; *Kowing v. Manly*, 57 Barb. 479, 488; s. c. 49 N. Y. 192, 198, fraud and forgery by the wife; *Brazil v. Moran*, 8 Minn. 286, assault and battery by the wife; *Ball v. Bennett*, 21 Ind. 427, action for setting fire to plaintiffs' mill by the wife; *Turner v. Hitchcock*, 20 Iowa, 810, trespass on plaintiff's premises and destroying personal property thereon; *Musselman v. Galligier*, 82 Iowa, 888; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Luse v. Oaks*, 36 Iowa, 562, slander by the wife; *Curd v. Dodds*, 6 Bush (Ky.), 681, action for fraud of wife in selling certain property of hers. Held, that she was not liable for a fraud in entering into a contract, the law of Kentucky not permitting her to make a binding contract; the doctrine of the text is fully recognized in the opinion. *Coolidge v. Parris*, 8 Ohio St. 594, assault and battery by the wife. The court held that a clause of the Ohio code—and the same is found in several other of the Western States—as follows,—“If the husband and wife are sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also,”—applies to equity cases where separate rights of the wife are involved and passed upon, and does not apply to such a common-law action as the one then before the court, against the husband and wife, and that the husband had complete control over

such an action. In *Kowing v. Manly*, 49 N. Y., Rapallo J. discusses the subject in a very learned and exhaustive manner, and from his opinion I make some extracts (p. 198). “The husband is at common law liable to be sued jointly with his wife for all torts committed by her prior to or during the coverture, and hence, where she has wrongfully taken and converted personal property of another, the action must be against both husband and wife, though he be in fact innocent of any wrong, and never received any part of the property. The liability of the husband in such a case does not rest upon the ground that he is in contemplation of the law guilty of the taking or conversion, but results from the incapacity of the wife to be sued without her husband. *Capell v. Powell*, 17 C. B. x. s. 743, 748.” Mr. Justice Rapallo goes on to discuss at considerable length the case where the taking and conversion is by both husband and wife jointly, when the conversion is regarded in law as for *his use* alone, and the action might be brought solely against him, but may also be brought against both because both are concerned in the trespass. He concludes as follows (p. 201): “He is not joined as defendant [in an action brought for her individual tort] on the ground that her guilt is imputed to him, but because so long as the marital relation continues the wife is incapable of being sued alone, and his liability continues only so long as the relation of marriage subsists. If after the commission of a tort by a married woman,

stated assumes that the wife acted voluntarily. If, however, the tort is committed by the wife in the presence and under the compulsion or direction of her husband, he alone is liable, and should be sued without making her a codefendant. In applying the latter rule, it is settled that if the tort is done by the wife *in the presence of her husband*, a *prima facie* presumption is raised that it was done by his direction and under his compulsion. This presumption may be overcome, and if it be shown that she acted voluntarily, although in his presence, she must be made a defendant. These common-law rules have not been in any respect changed by the codes.¹

§ 321. If, however, the tort is not committed by the wife personally, but is done by means of her separate property, or in the use thereof, or under color or claim of ownership of her separate property, the action should be brought against her individually, without joining the husband as a codefendant, in all those States whose statutes permit a married woman to be sued alone in respect of all matters which concern her separate estate.² In

she should be divorced, or the husband should die, the action could be brought against her alone, and if the death of the husband occurred pending an action against both, it would survive against the wife. But if *she* should die before or pending the action, it would not survive against the husband. This could not be if her wrong were imputed to him, or he were in law unqualifiedly responsible for it."

¹ *Brazil v. Moran*, 8 Minn. 286; *Ball v. Bennett*, 21 Ind. 427; *Curd v. Dodds*, 6 Bush (Ky.), 681, 685; *Cassin v. Delaney*, 38 N. Y. 178, per Hunt C. J. "An offence by his direction, but not in his presence, does not exempt her from liability; nor does his presence, if unaccompanied by his direction. The presence furnishes evidence and affords a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence." *Flanagan v. Tinen*, 53 Barb. 687. The rule is settled in Missouri, that if husband and wife both unite in committing a tort, as, for example, an assault and battery, a joint action against them will not lie, but the husband alone must be sued. *Dailey v. Houston*, 58 Mo. 861, 866, 867; *Meegan*

v. Gunsollis, 19 Mo. 417. But in an action against husband and wife for their joint fraud, it was held in New York that she would not be liable unless she actively participated in the wrong. *Vannemas v. Powers*, 56 N. Y. 39, 41.

² *Peak v. Lemon*, 1 Lana. 295. An action against a husband and wife for an alleged conversion of chattels by the wife. The act was done by her alone, under a claim of ownership of the chattel, but in fact her claim was not well founded, and the act was a wrongful conversion. The wife alone was held liable because the act was done under color of a claim of her ownership of the chattels as her separate property. *Eagle v. Swayze*, 2 Daly, 140. An action to recover damages caused by the fall of a chimney of a house owned by a married woman, the fall being caused by the negligent construction of the house, the wife alone was held liable and the action properly brought against her. *Rowe v. Smith*, 88 How. Pr. 87; s. c. on appeal, 45 N. Y. 280. A married woman owned a farm with horses, cattle, &c., upon it. These animals strayed upon the plaintiff's land, and did damage. The action was held properly brought against her alone, as the

other words, actions which concern or have relation to her separate property are not confined to those upon contract or those involving the ownership of the property, but extend to suits based upon torts and wrongs done by means or in the use of or claim to the property.

§ 322. Under the statutes of New York, a married woman may be sued alone upon any contract which she has made in a trade or business carried on by herself, or in her name by her agent, and the complaint should be in the ordinary form as though the action was brought against an unmarried woman.¹ She must also be sued in the same manner upon any contract made in relation to, or upon any liability growing out of her separate property. Finally, if she enters into any contract and therein charges the payment thereof upon her separate property, she is in like manner personally liable, and must be sued without making her husband a codefendant. The charge thus made does not create an equitable lien upon any particular property, nor even a general lien to be enforced by an equitable action. It simply creates a personal liability upon herself, to be enforced in an ordinary legal action, and by the recovery of any ordinary judgment for debt or damages. Such charge may even be verbal, and when made creates a personal liability which may be enforced against any property which she may have at the time, or any which she may afterwards acquire. In all these cases, it is not necessary to allege in

injury was caused solely by her separate property. *Baum v. Mullen*, 47 N. Y. 577. Action against a married woman alone to recover damages for fraud in the sale of land which she owned, the husband acting as her agent in the sale and making the fraudulent representations. The New York Court of Appeals held that the husband was not a proper party defendant. *Church C. J.*, after citing the statutes of 1860, 1862, that "the married woman may sue and be sued alone in all matters having relation to her sole and separate property, the same as if she were sole," added that the common-law rule as to her personal torts had not been changed; "but when such torts are committed in the management and control of her separate property, the rule is changed, and she is liable the same as if she were unmarried, and can be sued in the same manner."

The fact that her husband acted as her agent in the sale did not affect her liability, for he may be her agent the same as any other person. She is liable for frauds committed by her husband as her agent in carrying on a business for her. *Warner v. Warren*, 46 N. Y. 228.

¹ *Hier v. Staples*, 51 N. Y. 186. She has not the full power to contract; the contract must either be made in some trade or business which she carries on, or be for her personal services, or have a connection with her separate property. See the following cases: *Manchester v. Sahler*, 47 Barb. 155; *Smith v. Allen*, 1 Lans. 101; *Hart v. Young*, 1 Lans. 417; *Lennox v. Eldred*, 1 N. Y. Sup. Ct. 140; *Shorter v. Nelson*, 4 Lans. 114; *Hallock v. DeMunn*, 2 N. Y. Sup. Ct. 350; *Bodine v. Killeen*, 53 N. Y. 98; *Adams v. Honness*, 62 Barb. 326.

the complaint the special facts from which such liability arises; the complaint should be in the ordinary form, and all the special facts relating to her coverture should be averred in the answer.¹

§ 323. It is held, however, in several States, that in pursuance of the express language of their statutes, the husband is a necessary party defendant, even in all actions against the wife which concern her separate property. This construction is not based upon any interest which he has in the subject-matter of the controversy, but upon the peremptory terms of the statutory provisions which require such joinder.²

¹ These propositions are the final results at which the New York courts have arrived through a long and progressive series of decisions. *Maxon v. Scott*, 55 N. Y. 247; *Hier v. Staples*, 51 N. Y. 136; *Hinckley v. Smith*, 51 N. Y. 21; *Frecking v. Rolland*, 53 N. Y. 422, 426. "A general complaint in an action against a married woman is proper. The law makes her liable as a *feme sole* if the contract was made in her separate business or in relation to her separate estate. If the contract sued upon is not one she is authorized to make, the objection should be taken by answer and raised upon the trial." *Foster v. Conger*, 61 Barb. 145, 147; *Ainsley v. Mead*, 3 Lans. 116; *Perkins v. Perkins*, 62 Barb. 531. If a wife, having property, and living with her husband and family, buy goods, groceries, and the like, for the use of the family, and promises to pay their price, but does not expressly charge the payment upon her property, neither she nor her property is liable. *Baken v. Harder*, 6 N. Y. Sup. Ct. 440; *Weir v. Groat*, 6 N. Y. Sup. Ct. 444. A married woman who has a separate estate, and employs a lawyer to render services beneficial to it, thereby charges her property with the payment of his compensation, although there was no express agreement to charge. *Blanke v. Bryant*, 55 N. Y. 649. Where a wife had executed a note which expressly charged her separate property, and recited that the consideration was for the benefit of her said property, but in fact these recitals were entirely false, and the note was obtained from her by duress, and was used solely for the benefit of her husband, it was held, in New York, that no action could be sus-

tained upon it even by a *bona fide* holder; the court took the broad ground that such notes are not commercial paper, and are not governed by the rules of the law-merchant. *Loomis v. Ruck*, 56 N. Y. 462. For additional cases, illustrating the New York rule in reference to the wife's contracts made in connection with her property, see *Corn Ex. Ins. Co. v. Babcock*, 42 N. Y. 613; *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 450, which is superseded by subsequent decisions; *Owen v. Cawley*, 36 N. Y. 600; *Carpenter v. O'Dougherty*, 50 N. Y. 660; *Garretson v. Seaman*, 54 N. Y. 662; *Newell v. Roberts*, 54 N. Y. 677; *Fowler v. Seaman*, 40 N. Y. 692; *Quassaic Bank v. Waddell*, 3 N. Y. Sup. Ct. 680; *Miller v. Hunt*, 3 N. Y. Sup. Ct. 762; *Kelty v. Long*, 4 N. Y. Sup. Ct. 163; *Bogert v. Gulick*, 65 Barb. 322; *Warner v. Warren*, 46 N. Y. 228; *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 80. Contracts between the wife and husband. She may become his creditor, and maintain an action to recover the debt. *Woodworth v. Sweet*, 44 Barb. 268; 51 N. Y. 8; *McCartney v. Welch*, 44 Barb. 271; *Savage v. O'Neil*, 44 N. Y. 298; *Jaycox v. Caldwell*, 51 N. Y. 895. If the husband gives a note to his wife during the marriage, no action can be maintained on it by her against him or his representatives after his death, simply because there is no consideration; *Whitaker v. Whitaker*, 52 N. Y. 368; but if there is a consideration for the note, or if it is given by him in contemplation of marriage, she can enforce it by suit. *Wright v. Wright*, 54 N. Y. 437; *Banfield v. Rumsey*, 4 N. Y. Sup. Ct. 322.

² *Oatman v. Goodrich*, 15 Wisc. 539.

§ 324. The rule which prevails in Indiana, in reference to the personal liability of a married woman upon her contracts, has been recently settled by a series of very able and well-considered decisions. Her common-law disability to enter into contracts generally still remains in that State. She can only create an equitable liability of her separate property, resulting from something which operates as a specific charge upon it; and this charge can only be produced by an expressed intention, on the part of the

The action concerned the wife's separate property, and she was made a defendant without her husband. Dixon C. J. said (p. 598), after stating the common-law rules, and the statutes which take away all the husband's interest in the wife's property: "The statute—R. S. ch. 122, § 15—reads as follows: 'When a married woman is a party, her husband must be joined except that, 1. when the action concerns her separate property, she may sue alone; 2. when the action is between herself and her husband, she may sue or be sued alone.' This language is plain and unambiguous, and the case is not within the exceptions. The husband must therefore be joined. It is idle in such cases to look for the reason of the law, or to some other statute founded upon more rational principles for an excuse to evade the act in question." To the same effect are *Owsley v. Case*, 16 Wisc. 606; *Wolf v. Banning*, 8 Minn. 202, 204, per Flandreau J. "There is but one instance in which a married woman can appear without either her husband or her next friend, and that is when the action is between herself and her husband. When she is plaintiff in an action concerning her separate property, it is optional with her whether or not she will join her husband—she may sue alone." The statute is the same as in Wisconsin, except that it requires the wife to appear by a next friend. This opinion is exhaustive and valuable. See also *Mavrich v. Grier*, 8 Nev. 52. In *Iowa*, a wife may be sued alone upon her contracts made in relation to her separate property. *Mitchell v. Smith*, 32 Iowa, 484, 487. If she has separate property, she may bind it by an ordinary bond and mortgage, executed for any purpose. *First Nat. Bank of Ft. Dodge v. Haire*, 86 Iowa,

443; *Patton v. Kinsman*, 17 Iowa, 428. Where a husband, with his wife's knowledge and consent, purchased materials on credit, to be used in improving her separate property, and they were so used with her consent, she being fully aware that they were not paid for, her separate estate became chargeable for the price. *Miller v. Hollingsworth*, 86 Iowa, 168. In California, a married woman cannot bind herself by contract generally, so that a personal judgment can be obtained against her. Under a statute passed in 1850, she could create an equitable charge upon her separate estate, real or personal, only by means of a writing executed in the manner therein prescribed. *MacLay v. Love*, 25 Cal. 367; *Love v. Watkins*, 40 Cal. 547, 558. In 1862, this statute was amended and confined to her separate real estate, so that she may charge her separate personal estate by means of any contract, which, according to the doctrines of equity, creates an equitable lien upon it. *Terry v. Hammonds*, 47 Cal. 82. In Missouri, if a married woman has a separate property for her sole use, and executes a promissory note or any other promise to pay money, it will be presumed that she intended thereby to charge the separate estate with its payment; and it makes no difference what may be the form of the promise. *De Baun v. Van Wagoner*, 56 Mo. 847, 849. In Ohio, it seems, a married woman can enter into no contracts not connected with or relating to her separate property. *Swasey v. Antram*, 24 Ohio St. 87. The ordinary equity doctrine, as to the wife charging her separate estate, prevails in Nebraska, *McCormick v. Lawton*, 3 Neb. 449; and in Oregon, *Kennard v. Sax*, 8 Oregon, 263, 267.

married woman, to impose such a lien. The wife must therefore, by her contract, intend to charge her separate property, and the complaint must allege such an intent. A contract entered into by her upon the credit of her property is not sufficient to sustain the equitable action to reach her property. It follows, therefore, that the contract must be special in its form, and must expressly state her intention to charge the payment thereof upon her estate. It can then be enforced, not by a personal action and pecuniary judgment against her, but by a purely equitable suit and a judgment *in rem* against the property.¹

§ 325. Under the statutes of many States respecting homesteads, it is the established rule that the wife has such a vested interest in the homestead, that she is always a proper, and, generally, a necessary party defendant with her husband in all actions which may affect the title thereto, or the right to the possession thereof. At all events, her interest will not be cut off unless she

¹ *Kantrowitz v. Prather*, 81 Ind. 92. An action against a married woman for goods sold and delivered. The complaint alleged that she had a separate property, and that the goods were sold and the credit given her upon the faith of her said property, and prayed a judgment that the amount recovered might be made a charge thereon. A demurrer to this complaint was sustained. The exhaustive opinion by Ray J. cites and approves the doctrine laid down by Lord Romilly, M. R., in *Shattock v. Shattock*, Law R. 2 Eq. 182, and in *Matthewman's Case*, Law R. 8 Eq. 781, and the decision of the court in *Yale v. Dederer*, 22 N. Y. 460; *Ballin v. Dillaye*, 87 N. Y. 85; *Willard v. Eastham*, 15 Gray, 828. The same doctrine was repeated in *Lindley v. Cross*, 81 Ind. 106, which also held that a married woman may charge her separate property for improvements which are necessary and proper for its full enjoyment, as, for example, the erection of a house upon it. *O'Daily v. Morris*, 81 Ind. 111, holds that the common-law doctrine as to her power to bind herself by contract has not been changed. *Montgomery v. Sprinkle*, 81 Ind. 118. A married woman, who had separate property, carried on a partnership in the usual manner and form with her husband. It was held, that she was not liable for the debts of the firm, nor

could her property be charged therewith. *Bellows v. Rosenthal*, 81 Ind. 116. A married woman was owner of property with which she carried on a business as a dealer in clothing through her husband as agent or clerk. The debts incurred in the business, it was held, could not be made out of such property. *Smith v. Howe*, 81 Ind. 238. A married woman can only charge her separate property with such contracts as are reasonably calculated to preserve and protect or benefit it, or to make it more profitable to her. These decisions clearly show that, although the wife's property may be her own separate estate free from any interest or control of her husband, her powers to make contracts even in relation to it have not been in the least increased by the legislation of that State. Such powers are the same as those admitted by the courts of equity as incidents of her equitable separate estate. See, also, *Mendenhall v. Treadway*, 44 Ind. 131; *Smither v. Calvert*, 44 Ind. 242; *Kinnaman v. Fyle*, 44 Ind. 275; *Sharpe v. Clifford*, 44 Ind. 346; *Hodson v. Davis*, 43 Ind. 258; *Johnson v. Tutewiler*, 35 Ind. 353; *Hasheagen v. Specker*, 36 Ind. 418; *Armstrong v. Nichols*, 32 Ind. 408; *Coats v. McKee*, 26 Ind. 223; *Stevens v. Parish*, 29 Ind. 260; *Maier v. Martin*, 43 Ind. 314.

is made a party. Even when the husband himself brings an action in order to enjoin a sale of the homestead, or seeking in any other way to protect his right, the defendants, for their own security, may, and perhaps should, require the wife to be brought in as a plaintiff.¹

§ 326. Statutes of California permit a married woman, by complying with certain requirements, to carry on business as a sole trader, make her exclusive owner of the money, debts, and property embraced therein, and declare that the husband, under such circumstances, shall not be responsible for any debts contracted by her. Under this legislation it is held that the wife who engages in business is in respect thereof to be regarded as a single woman, and any action brought on account of the trading must be against her alone; the joinder of the husband would be improper and irregular.²

§ 327. At the common law, the husband became liable during the marriage for the debts of his wife contracted before the marriage; but the action was to be brought against both, although the satisfaction of the judgment would be, of course, made out of his property. In the States where this common-law rule has not been abrogated, the same practice subsists; the husband and wife must be joined as defendants in actions upon such demands.³

¹ *Chase v. Abbott*, 20 Iowa, 154, 160, per Cole J. "The right of the wife in the homestead being a vested right, she cannot be completely barred or divested of that right by judicial proceedings, except upon making her a party thereto. It would therefore be the safer practice, in all controversies affecting the homestead, to make her a party, and generally she should be a party. Where the husband seeks to enjoin a sale of the homestead or other like proceedings, because it is a homestead, and therefore exempt to him in his own right, we would not now say that the wife was a necessary party. And yet if he should fail in his action and judgment pass against him, it is reasonably clear that such judgment would not conclude the wife. The absolute safety of the defendant in such a case, and the conclusiveness of the judgment as against the wife, could only be effected by causing her to be made a party, which he would doubtless have a right to do." See also *Barnap v. Cook*, 16 Iowa, 149, 153,

158, per Dillon J.; *Larson v. Reynolds*, 18 Iowa, 579; *Revalk v. Kraemer*, 8 Cal. 66, 72; *Marks v. Marsh*, 9 Cal. 96; *Moss v. Warner*, 10 Cal. 296; *Sargent v. Wilson*, 5 Cal. 504; *De Uprey v. De Uprey*, 27 Cal. 829, 832. The California rule is, that in actions relating to the homestead, both husband and wife must be parties plaintiff or defendant, as the case may be; if one only is made a party, he or she even is not bound. If one is sued alone, the other may intervene.

² *McKune v. McGarvey*, 6 Cal. 497.

³ *Platner v. Patchin*, 19 Wisc. 383, 385. The common-law rule as to liability and as to the parties, is unchanged in Wisconsin. *Beaumont v. Miller*, *Stanton's Code* (Ky.), p. 75; *Fultz v. Fox*, 9 B. Mon. (Ky.) 499, 502. In Kentucky, the husband is freed from personal liability; but the property which he acquires from the wife by the marriage, and the land which she owns, may be taken in satisfaction of the demand. The suit, however, should be against both jointly.

Even in the States where the former doctrine as to the husband's *liability* has been modified, as in New York, by making him responsible for such debts only when he has acquired property from the wife by the marriage, and to the extent merely of the property so acquired, the form of the action remains unchanged, and it must be brought against both as defendants.¹

§ 328. The codes of several States contain a provision that, "if the husband and wife be sued together, she may defend for her own right, and if the husband neglect to defend, she may defend for his right also." The former clause of this section at least, applies only to equitable suits in which separate rights of the wife are involved, as, for example, those relating to her separate property; it has no application to ordinary legal actions in which both are sued jointly, and over which the husband has still, as under the former practice, the entire control.² It was a settled rule of the equity procedure that, in an action against husband and wife, not affecting her separate estate and seeking no relief against her property, service of process upon the husband was a good and sufficient service upon the wife, and he could appear on her behalf, so that she would be bound by the decree made upon such service and appearance. This rule, it is said in some cases, still subsists under like circumstances. Of course, if the wife's separate property is involved, or if any relief is demanded against her directly, she must be personally served, and has a right to appear independently of her husband. This right, although expressly secured by statute in some States, exists independently of any such statutory permission.³

¹ Laws of New York for 1853, ch. 576, §§ 1 and 2. This statute enacts that the husband shall be liable for such debts only to the extent of the property which he may acquire from her by the marriage; and that the action may be brought against them jointly. See *Lennox v. Eldred*, 65 Barb. 410. For a similar Kentucky statute, see last preceding note. The same rule prevails in Indiana. *Shore v. Taylor*, 46 Ind. 345.

² *Coolidge v. Parris*, 8 Ohio St. 594; *Wolf v. Banning*, 8 Minn. 202. Such legal actions as those for torts done by the wife, or debts due by her *dum sola*, and others, in which the law still requires both

spouses to be made defendants, are not affected by the statutory provision.

³ *Foot v. Lathrop*, 53 Barb. 183; *Lathrop v. Heacock*, 4 Lans. 1. This was a foreclosure suit, the mortgage being upon lands of the husband, so that the wife's only possible interest was to protect her inchoate right of dower. *Wolf v. Banning*, 8 Minn. 202, 204. *Contra*, *McArthur v. Franklin*, 15 Ohio St. 485; s. c. 16 Ohio St. 193. This case was similar in all its features to *Foot v. Lathrop*, *supra*. Both were parties, but service was made on the husband alone. Held, that the wife was not concluded, and her dower right was not cut off. The cases are diametrically opposed to each other.

THIRD: EQUITABLE ACTIONS.

§ 329. I. *General Principles.* In all equitable actions, a broad and most important distinction must be made between two classes of parties defendant; namely, (1) those who are "necessary," and (2) those who are "proper." Necessary parties, when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation. Confusion has frequently arisen from a neglect by text-writers, and even judges, to observe this plain distinction. Parties are sometimes spoken of as necessary when they are merely proper. Thus, because a decree cannot be rendered which shall determine the rights of certain classes of individuals without making them defendants in the action, they are not unfrequently called necessary parties; or, in other words, because they must be joined as defendants in a particular suit, in order that the judgment therein may bind *them*, they are denominated "necessary" parties absolutely. Such persons are "necessary" *sub modo* — that is, they must be brought in if it is expected to conclude them by the decree; but to call them "necessary" absolutely is to ignore the familiar and fundamental distinction between the two classes of parties which has just been mentioned. This inaccurate use of language would make every person a necessary party who should actually be joined as a codefendant in an equitable action.

§ 330. I will illustrate these positions by a familiar example. In an action to foreclose a mortgage, the owner of the land covered by it is a necessary defendant, because without his presence no decree can be made for the sale of the land; in other words, no effective decree at all, and the suit would be an empty show of litigation. The holders of subsequent mortgages, judgments, and other liens upon the same land, are not necessary parties in order to the rendition of an effective judgment, because the land can be sold without their presence and without cutting off their liens. If, however, the plaintiff desires to settle all the

questions involved in one controversy, and to determine the rights of all the persons who have any interest in the land, he must bring in all these holders of subsequent liens, so that a judgment may be given which shall foreclose their rights. To accomplish this end, these persons must be made defendants; and in that respect they are necessary parties — that is, necessary in order to attain the particular result desired. They are not, however, necessary to the decision of the main issues involved in the suit and to the granting of a decree. If we use language accurately, we shall call them proper parties, and shall thus distinguish them from the other class, without whom the judicial machinery cannot be put in motion. Every person who is rightly joined as a defendant in an equitable action, is, in a certain broad sense, a *necessary* party, because his presence is necessary to accomplish some particular end, and to make the judgment more complete than it otherwise would have been; but to use the term in this broad sense is to lose all the benefits of an accurate classification and of practical rules depending on such classification. To sum up: Necessary parties defendant are those without whom no decree at all can be rendered; proper parties defendant are those whose presence renders the decree more effectual; and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy. A practical test will at once fix the class into which any given persons interested in an equitable litigation must fall. If the person is a necessary defendant, a demurrer for defect of parties on account of his nonjoinder will be sustained; and conversely, if the demurrer will be sustained, the person is a *necessary* party. If the given person is merely a *proper* party, such a demurrer will not be sustained on account of his nonjoinder, although the court may undoubtedly, in the exercise of its discretion, order him to be brought in.

§ 331. The principal provision quoted at the commencement of the present Section, and which is the same in all the codes of procedure, is a general and concise statement of the doctrine which had long prevailed in courts of equity in relation to the joinder of defendants. As the language of this provision is permissive — any person *may* be made a defendant, not *must* be — it was evidently intended to embrace “proper” as well as “neces-

sary" parties within its requirement. The doctrine of equity, expressed in its most general form, is, that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, should be made parties to it, either as plaintiffs or as defendants, so that there may be a complete decree which shall bind them all.¹ Those whose interests are adverse to the claims set up by the plaintiff, and who would therefore naturally resist such claims, should be brought into the action as defendants. On the other hand, those whose interests are concurrent with the interests of the principal plaintiff who actually institutes and prosecutes the suit, should primarily be joined with him as coplaintiffs. But, as has already been shown in the preceding section, equity procedure is not strenuous in respect to this accurate division, and often permits individuals of the latter class to be made defendants, being satisfied if they are before the court so as to be bound by the decree. The persons who are interested in resisting the demands of the actual plaintiff, and who must therefore be defendants in the action, are separated, according to the nature of their interests and of their relations with each other, into two classes, — those immediately interested, and those consequentially interested. When an individual is in the enjoyment of the subject-matter, or has a right, interest, or estate in it, either in possession or in expectancy, which is liable to be defeated or diminished by the plaintiff's success, he has an immediate and direct interest in resisting the plaintiff's demand, and is, in general, a necessary defendant. The interest here spoken of need not be personal and beneficial; it includes any estate or right in the subject-matter, legal or equitable, whether beneficial to the holder thereof or not.² Numerous illustrations of this fundamental doctrine are given in the succeeding portions of this Section.

§ 332. If a person not thus immediately interested is, nevertheless, so related to the subject-matter and to the principal defendant that, upon the plaintiff's success, he will be liable to be proceeded against by such defendant, and to be compelled to make compensation, in whole or in part, for the loss, he is conse-

¹ See Story, Eq. Pl. §§ 72, 76 a. It has been suggested that this general doctrine should be stated as follows: All persons materially interested in the object of the suit should be made parties. See Calvert on Parties, pp. 1-11; Story, Eq. Pl. §§ 76 b, 76 c.

² 1 Dan. Ch. Pl. (4th Am. ed.) p. 246.

quantitatively interested in the subject of the action, and is also, in general, a necessary, or at least a proper codefendant. Equity requires this class of persons to be joined as defendants, not because they will be directly affected by the decree when rendered, but because if the plaintiff succeeds against the principal defendant, the latter will then have the right to call upon them to reimburse him, wholly or partially, or to do some other act which shall, according to the nature of the case, restore or tend to restore him to his former position before the recovery against him. To avoid a multiplicity of actions, such persons should, in general, be brought into the suit in the first instance, so that their secondary or consequential liabilities may be determined and adjusted together with the main issues in the one decree.¹ I shall now apply these very general statements of doctrine to the classes of cases which most frequently arise in actual practice.

§ 333. II. *Actions to foreclose Mortgages.* The first class or group of equitable actions which I shall take up, both because it is the most familiar and because it illustrates very clearly the general doctrine, is that of suits to foreclose mortgages. The statute distributes the persons who may be proper or necessary parties defendant into two divisions, those "who have or claim an interest in the controversy adverse to the plaintiff," and those "who are necessary parties to a complete determination or settlement of the questions involved therein." It is plain that the latter division is the more comprehensive, and in fact includes the former. Every person "who has or claims an interest in the controversy adverse to the plaintiff," is evidently "a necessary party to a complete determination of the questions involved therein;" but, on the other hand, it is equally evident that there may be persons "who are necessary parties to a complete determination of the questions involved, but who do not have nor claim any interest in the controversy adverse to the plaintiff." A single example will illustrate this position. The codes of several States require the assignor of a thing in action to be made a codefendant "to answer to the assignment" in a suit brought by the assignee. Of the two defendants, when this is done, the

¹ 1 Dan. Ch. Pl. (4th Am. ed.) p. 282; 333; *Cosby v. Wickliffe*, 7 B. Mon. 120; See, also, Story Eq. Pl. §§ 159, 162, 169, *Wiser v. Blachly*, 1 Johns. Ch. 437; 189 a, 172, 173, 176; *Greenwood v. Atkinson*, 5 Sim. 419; *Wilkinson v. Fowkes*, *New Eng. &c. Bank v. Newport Steam Factory*, 6 R. I. 154. 9 Hare, 198; *Knight v. Knight*, 8 P. Wms.

debtor alone has an interest in the controversy adverse to the plaintiff. The assignor has no such interest; he is not liable for the debt; his interest in the result is rather in accord with than in opposition to the plaintiff. He is, however, a necessary party to a complete determination and settlement of the questions involved in the suit. One of these questions is, whether the cause of action was in fact assigned to the plaintiff; and it is important to the rights of the debtor that this question be for ever settled in the single action. In the absence of any positive requirement of the statute, the assignor would not be a *necessary* defendant, because a judgment could be rendered against the debtor without the presence of the assignor. This example well illustrates my statement above, that one may be a party necessary to the settlement of all the questions involved in the suit, and at the same time neither have nor claim any interest adverse to the plaintiff. This evident distinction will aid us in discriminating between the necessary and the proper parties defendant in any given equitable action, for, as a general proposition, all those persons who have or claim an interest in the controversy adverse to the plaintiff are "*necessary*" defendants, if by "*interest adverse*" is intended an *interest opposed to a recovery of judgment by the plaintiff*; while those who, in contradistinction to the former, are merely "*necessary parties to a complete determination of the questions involved,*" are, in the main, "*proper*" defendants.

§ 334. These principles may now be applied to the class of actions under immediate discussion, — those brought to foreclose mortgages. Those persons who own or have an estate in the land to be sold under the decree, and those who, in the original creation of the debt, or by any subsequent assumption of it, are debtors to the mortgagee, and therefore liable to a personal judgment for a deficiency, have an interest in the controversy adverse to the plaintiff, and are beyond doubt necessary parties, if the plaintiff desires to obtain all the relief which the law affords him, namely, of sale and personal judgment for deficiency. If, however, the plaintiff will be satisfied with a partial relief, and simply asks a decree for a sale without any personal judgment for a deficiency, the debtor, unless he is also owner of the land in whole or in part, is not a necessary defendant. The decree and sale must of course divest all ownership and titles to the land or any part thereof, or else there would be no sale but

simply the show of one. But in order that the land may produce its full value, the decree and sale must go further than this, and must cut off all subsequent liens and incumbrances, and inchoate interests which are not titles but merely the seeds of titles. There is thus a threefold object of the judgment: (1) To divest the title of the present owner, and transfer the ownership to the purchaser. This is essential, and all persons who have any such title are necessary parties, for without them the whole action would be a nullity. (2) To cut off all liens and inchoate interests, so that the land can be sold at a greater advantage. This is of course not absolutely essential, for a sale can be effected without it. The holders of such liens and inchoate interests are *proper* parties. (3) To obtain a decree for any deficiency which may arise after the sale, against those persons who are liable for the mortgage debt. All such debtors are necessary parties if the plaintiff seeks to obtain this particular relief; but he may waive this relief and content himself with the sale and the proceeds thereof, in which case these mere debtors would not be necessary defendants. The foregoing principles have been adopted by all the courts. The doctrine is universally established that in the equitable action to foreclose a mortgage by a sale of the mortgaged premises, all persons who own the land or any part thereof, all who have any interest therein vested or contingent, perfected or inchoate, subsequent to the giving of the mortgage, all who are owners or holders of any subsequent liens or incumbrances thereon, and finally all who are personally liable for the debt secured by the mortgage, may generally be united as defendants; and must be made defendants if the plaintiff seeks to obtain a decree affording him all the relief which the court can grant. As titles, interests, and liens prior and paramount to the mortgage are in no way affected by it or by the decree of foreclosure and the sale thereunder, the owners and holders thereof are neither necessary nor proper parties.

§ 335. While this general statement of the doctrine is universally accepted, there are some points of difference in its practical application. These differences will be found, upon careful examination, to arise, not from any doubt as to the general principle itself, but from a certain want of uniformity in the local law of the various States in respect to the nature of liens and incumbrances upon the land, and in respect to the nature of

inchoate or contingent interests in the land. Thus, if in one State a judgment, when docketed, becomes a lien upon the lands of the debtor, and in another such a judgment is not a lien, a judgment creditor of the owner of the mortgaged premises would plainly be a proper party defendant in the first-named State, and as plainly not a proper party in the second. The most important difference in the local law defining and regulating the nature of interests in the land, relates to the inchoate dower of the wives of mortgagors and of other subsequent owners, and especially where the mortgage is given for purchase-money so as to take precedence of the dower right of the mortgagor's wife. In some States where dower is carefully protected, the wives of the mortgagors and of other subsequent owners of the land are in all cases regarded as having a positive interest in the equity of redemption, even though they joined in the execution of the mortgage, or even though the lien of the mortgage be prior to their dower right; and they are therefore, under all possible circumstances, necessary defendants if the plaintiff wishes to cut off their rights of redemption. In other States, the wives, under some circumstances at least, are not regarded as having any real interest in the land, nor any right of redemption, and they need not therefore be made defendants for any purpose. This example is a sufficient illustration, and shows that any difference in the practical rules laid down by various courts arises from a variation in the law defining the nature of interests in the land; what constitutes an interest in one State may not do so in another.

§ 336. I pass from this broad statement of the general principle to a more careful discussion of the rules, with an analysis of some leading cases. The doctrine which I have thus stated is approved and applied under various circumstances, and to different classes of persons having different interests and liens in the cases cited in the foot-note.¹ When the mortgagor remains owner

¹ Hall v. Nelson, 23 Barb. 88; 14 How. Pr. 32; Story, Eq. Pl., §§ 198, 197; Peto v. Hammond, 29 Beav. 91; Maule v. Duke of Beaufort, 1 Russ. 849; Lenox v. Reed, 12 Kans. 228, 228. Owner of the land is a necessary defendant, and the objection on account of his omission may be taken by the mortgagor in his answer. The fact that the deed from the mortgagor to this owner was not put on record at the time of commencing the action makes no difference in the application of this rule. Drury v. Clark, 16 How. Pr. 424. The mortgagor who has conveyed away the land to a grantee who assumed to pay the mortgage debt, and who is made a defendant, is not a necessary party. McArthur v. Franklin, 15 Ohio St. 486, 509; s. c. 16 ib. 198. The wife of the mortgagor, who joined in executing the mortgage, is a

of the premises, he is of course, on every account, a necessary defendant. If, however, he has conveyed away the entire land

necessary party in order to cut off her right of redemption; citing and approving *Denton v. Nanny*, 8 Barb. 624; *Mills v. Van Voorhies*, 20 N.Y. 415; and *Story's Eq. Pl.*, §§ 72, 76 *a*. *Union Bank v. Bell*, 14 Ohio St. 200. Where a mortgagor had conveyed the land to assignees in trust for his creditors, it was held, in an action to foreclose the mortgage in which the mortgagor and the assignees were made defendants, that judgment creditors of the mortgagor whose judgments were recovered subsequent to the assignment, were proper defendants, and could set up usury in the mortgage as a defence thereto; that the trustees could set up such a defence, and these *cestuis que trustent* could do the same. *Brinkerhoff J.*, after quoting the section of the code relating to defendants, said: "These creditors have an interest in the controversy adverse to the plaintiff, and they are therefore proper parties defendant." See this case at large. *Delaplaine v. Lewis*, 19 Wisc. 478. A mortgagor who has absolutely conveyed away the land is not a necessary defendant. *Cole J.* (p. 478): "According to the weight of modern authority, the rule seems to be settled that the mortgagor who has absolutely parted with the equity of redemption is not a necessary, though he is a very proper defendant in an action to foreclose the mortgage;" citing *Bigelow v. Bush*, 6 Paige, 343; *Shaw v. Hoadley*, 8 Blackf. 165; *Van Nest v. Latson*, 19 Barb. 604; *Drury v. Clark*, 16 How. Pr. 424; *Story's Eq. Pl.* 197. *Cord v. Hirsch*, 17 Wisc. 408. The owner of the land is a necessary defendant. *Green v. Dixon*, 9 Wisc. 582. See this case for a general discussion of the entire doctrine as to parties in foreclosure suits. *Nichols v. Randall*, 5 Minn. 304, 308, per *Emmett C. J.* When the mortgage debt is secured by the obligation of any person other than the mortgagor, the plaintiff may, in Minnesota (by express statute), make such other person a defendant in the foreclosure suit, and the court may decree against him for any deficiency. "The plaintiff, in an action to foreclose, may make any one a party defendant who has or claims to have, through the mortgagor, any in-

terest in the mortgaged premises, and the mere fact that the relief asked against him is different from that asked against the mortgagor or other defendant can make no difference." *Wolf v. Banning*, 8 Minn. 202, 204. When a mortgage is given by a husband and wife on land which is the wife's separate property, the husband is a necessary party because of his interest as husband, and because of his liability on the note or other evidence of debt in which he joined, for any deficiency. *Mavrich v. Grier*, 8 Nev. 52. A trustee of a married woman gave a mortgage for the purchase-money of land which he held in trust. An action to foreclose was brought, and it was held that the married woman and her husband, as well as the trustee, were necessary defendants. *Beatty C. J.* (p. 57): "It seems to be well settled that, in a bill to foreclose a mortgage against a trustee, the *cestui que trust* must be made a party. *Story's Eq. Pl.*, §§ 207, 209. The wife, though not a party to the mortgage, was a necessary defendant. When a married woman is a necessary defendant, it seems equally clear that the husband should also be a party to the suit and joined with her, unless his interest is adverse, when he might be made a plaintiff." This ruling as to the husband would certainly not be followed in those States which have completely separated the interests of the husband and the wife in respect of her own property. *Thornton v. Pigg*, 24 Mo. 249; *Riddick v. Walsh*, 15 Mo. 588. In an action to foreclose a mortgage executed by a husband and wife, the wife is not a necessary defendant in Missouri. *Miles v. Smith*, 22 Mo. 502. In same State, when the mortgagor is dead, his personal representatives are necessary defendants with his heirs and widow. *Fletcher v. Holmes*, 32 Ind. 497; an action on a purchase-money mortgage in which the wife of mortgagor did not join; she was not made a defendant. *Elliott J.* held, (1) that, under the Indiana statute, the wife takes her dower as the statutory heir of her husband, and not under the common law; she takes in fee, and without assignment. (2) That, in case of a purchase-money mortgage,

by an absolute deed of conveyance, the grantee, who is the owner at the time of commencing the suit, is a necessary party defend-

she has no right to redeem either as wife or widow, and is not a proper party; she is cut off by the decree and sale, even though not a party. *Mills v. Van Voorhies*, 20 N. Y. 412, is expressly repudiated. *Frazer J.* dissented entirely from this reasoning, and from the conclusion, adopting the doctrine of the New York case just mentioned. *Gregory C. J.* dissented from the reasoning, holding that, when the mortgaged premises do not exceed in value the amount of the debt, the wife has no right of redemption; but when they do so exceed the debt, she has such right. This case does not seem, therefore, to decide any rule definitively. *Chambers v. Nicholson*, 30 Ind. 849. When the ordinary mortgage — i. e., not purchase-money — is executed by the mortgagor and his wife, she is a proper defendant. *Martin v. Noble*, 29 Ind. 216. The complaint must show that defendant has or claims some interest. *Watt v. Alvord*, 25 Ind. 533. The wife of the owner, to whom the mortgaged premises have been conveyed, and who is himself a defendant, is also a proper defendant. "Inasmuch as she has a contingent interest in the equity of redemption, we know of no reason why she should not be made a party to foreclose that contingent interest." *Johnson v. Britton*, 23 Ind. 105. Where A. conveyed lands on which there was a mortgage which he had before executed to B., and agreed with his grantee to pay off said mortgage to B., and gave his grantee a mortgage on other land to secure the performance of that agreement; in an action by the grantee to foreclose the last-mentioned mortgage on account of the mortgagor's failure to perform his agreement, and pay off the former one, it was held that B., the holder of such first-named mortgage, was a proper but not a necessary defendant. The court would order him to be brought in if the mortgagor should demand it for his own protection, or if he himself should intervene. *Holdridge v. Sweet*, 23 Ind. 118; *French v. Turner*, 15 Ind. 59. When a mortgage, given to secure a bond, was assigned, but no assignment was written on the bond, under the special provisions of the Indiana

code in relation to assignment of things in action, the assignor (the mortgagee) is a necessary defendant. *Stevens v. Campbell*, 21 Ind. 471. Where a mortgage had been executed by a husband and wife, and the land had been subsequently conveyed, the mortgagor and wife are not necessary parties in an action to foreclose brought against their grantee, unless the plaintiff asks a judgment for deficiency against the mortgagor, or unless he wishes to cut off any right of redemption which may, under some circumstances, remain in the wife; but the grantee has no interest in these questions, and cannot raise them. If the wife had united in the deed of conveyance to the grantee, she would, of course, have parted with all possible interest in the land, and could not be a proper defendant. *Sumner v. Coleman*, 20 Ind. 436, holds that the owner of the land subject to the mortgage is not a necessary, although he is a proper party defendant. This decision is opposed to the overwhelming weight of authority, and is clearly wrong in principle. *Gower v. Howe*, 20 Ind. 396. A mortgage was given to secure a negotiable promissory note. The payee and mortgagee indorsed and transferred the note to the plaintiff, but did not expressly assign the mortgage. Held, that such assignor was not a necessary defendant under the Indiana code, as the note was assigned by indorsement, and its transfer carried with it the mortgage also. *Burkham v. Beaver*, 17 Ind. 367. A mortgagor who has conveyed away the equity of redemption is not a necessary defendant; but no judgment for deficiency can be rendered without his presence as a party. *Gaines v. Walker*, 16 Ind. 361. A subsequent judgment creditor of the mortgagor is not a necessary defendant; and an allegation in the answer that such a person has not been made a party is immaterial. *Proctor v. Baker*, 15 Ind. 178. A junior mortgagee is not a necessary defendant; but, if not made a party, he may redeem after the decree and sale. *Muir v. Gibson*, 8 Ind. 187; *Story's Eq. Pl.*, § 196. If the mortgagor dies intestate owning the land, his heirs are necessary parties defendant; no

ant, even though his deed has not been put upon record, because without his presence the decree for a sale, which is the essential

decree is possible without them; and the court will order them brought in on its own motion, even if the objection has not been raised. *Douglass v. Bishop*, 27 Iowa, 214, 216. When a part of the mortgaged premises has been conveyed, the grantee thereof is not an indispensable party to the foreclosure; the decree is not void; the purchaser under it would obtain a title subject to the right of the grantee to redeem. This case is to be distinguished from that in which the entire premises have been conveyed. *Newcomb v. Dewey*, 27 Iowa, 881. A junior incumbrancer is not a necessary party defendant, but must be made a defendant in order to cut off his right of redemption. *Moomey v. Maas*, 22 Iowa, 880. A husband gave a mortgage in which his wife did not join, and afterwards died, leaving her his widow. The mortgage was subsequently foreclosed in an action in which she was made a defendant, but the petition contained no allegations respecting her dower right, nor was such right put in issue. The land was sold under the decree. Held, that her dower right was not cut off; it was unaffected by the decree, and she need not redeem. See also, to the same effect, *Merchants Bank v. Thomson*, 55 N. Y. 7, 11. *Huston v. Stringham*, 21 Iowa, 86. Although the mortgagor has conveyed the land, he is a proper party, and may come in and contest the validity of the mortgage. If he has died, his administrator may do the same. In this case the administrator, who had been made a defendant, set up the defence of usury. The plaintiff, therefore, struck him out as a party. Held, that he should be permitted, on his own application, to come in and defend by alleging such defence. As the mortgagor or his estate may be held liable for a deficiency, this decision is clearly just. *Standish v. Dow*, 21 Iowa, 868. The holder of a prior mortgage is a proper but not a necessary party defendant, even though the validity of his mortgage is not attacked, and no relief is asked against him. *Sed qu.*, as it is conceded that the rights of the prior mortgagee are not affected, why should he be put to any trouble for nothing? There

can be no possible reason for making him a defendant. *Anson v. Anson*, 20 Iowa, 55. A mortgage had been foreclosed, and the land sold under the decree. A subsequent mortgagee had not been made a defendant in this action. He now brings this suit to foreclose his own mortgage, making the prior mortgagee and the purchaser at the former foreclosure sale defendants, and praying to redeem as against them. Held, that his rights had not been cut off, and that he might redeem. *Dillon J.* said (p. 58): "Under these circumstances, the principle is elementary and undisputed that the second mortgagee is not barred of his right to foreclose against the mortgagor, nor of his right to redeem against the first mortgagee, or his assignee, or the purchaser at the foreclosure sale (citing *Ten Eyck v. Casad*, 15 Iowa, 524, and other cases quoted *infra*). But the defendants contend that this rule has been altered by statute, and refer to, and rely upon the act of 1860, ch. 114, p. 148. Revision, § 3664. This act provides, 'that in all cases when judgments or decrees are rendered by any of the courts of this State upon a foreclosure of mortgages upon real estate, the defendants, judgment creditors, and other creditors having liens upon the mortgaged premises, shall, in case of the sale of the mortgaged premises on execution, have the same time to redeem and the same rights of redemption as in cases of sales on ordinary judgments at law. . . . Viewed in the light of the occasion of its passage, it is plain that the legislature do not intend to enact the startling innovation and unreasonable rule that a subsequent lien-holder, though not made a party, would, unless he redeemed within the time limited, be forever barred of the right.' He goes on to show that this statute was meant to enlarge, and not to restrict, rights of redemption. It applies only to subsequent creditors, &c., who have been made parties, and whose rights would otherwise have been cut off by the sale. It allows them to redeem, notwithstanding the sale. The conclusion is, that the prior rule as to persons not made parties is untouched by this statute. *Knowles v. Rablin*, 20 Iowa,

primary remedy granted by the action, cannot be made.¹ In a few cases, however, such parties have been spoken of as *proper*

101. If a subsequent incumbrancer is not made a party, his right of redemption is unaffected; but, in order to redeem, he must pay off the entire mortgage debt. *Chase v. Abbott*, 20 Iowa, 164. Every subsequent incumbrancer must be made a party in order to be foreclosed; also the wife of the mortgagor. *Street v. Beal*, 16 Iowa, 68. A subsequent incumbrancer is not a necessary defendant; omitting to join him does not vitiate the proceedings. But he must be made a defendant to cut off his right of redemption. In redeeming, he must pay the entire mortgage debt. *Darlington v. Effey*, 13 Iowa, 177. When the mortgagor is dead, and a foreclosure suit is brought against his heirs, his administrator is a proper though not a necessary party, because the estate may be liable for a deficiency, and he may have a defence to the mortgage. He may, therefore, intervene. *Johnson v. Monell*, 13 Iowa, 800. After the mortgagor has conveyed the equity of redemption, he is a proper but not a necessary party. A decree can be rendered for a sale, but none for a deficiency without him. *Semple v. Lee*, 13 Iowa, 304. The mortgagor and the present owner, to whom he had conveyed the entire premises, and who had assumed to pay the mortgage debt, were both held proper, but neither of them necessary defendants. The absurd result to which this decision leads is spoken of *infra*, in the text and in the note. *Parrott v. Hughes*, 10 Iowa, 459. A chattel mortgage was executed on a steam-engine. The mortgagor being left in possession, placed the engine in a mill in such a manner that it became affixed to the soil, as was alleged, and afterwards gave a mortgage on the land, including the mill. In an action to foreclose the chattel mortgage, the mortgagee of the land was held to be a proper defendant, and, on his own application, he was admitted, on the ground that his rights might be adjusted in the one suit. *Suiter v. Turner*, 10 Iowa, 517. A failure to make the occupant of mortgaged premises a defendant

in a foreclosure suit will not invalidate the proceedings as to the actual parties; but the rights of the occupant will not be prejudiced by the decree. *Heimstreet v. Winnie*, 10 Iowa, 480. The only question was, whether Casad, a subsequent incumbrancer, was a necessary party defendant. *Lowe C. J.* said: "It is certainly regular and good practice to make all persons, whether senior or junior incumbrancers, parties in a foreclosure proceeding, for the very plain reason that it gives stability and security to the purchaser's title, prevents a multiplicity of suits, and tends to secure a proper distribution of the proceeds of the mortgaged property among the claim-holders according to the priorities of their respective liens. But we are not aware that it has ever been held absolutely necessary. It is not essential that prior mortgagees should be made parties, because their interests are not, and cannot be, touched in the suit, and are paramount to the party foreclosing. Nor is the making of the subsequent mortgagees parties indispensable, for the reason that the law of foreclosure established by the code not only does not require it, but § 2088 seems to contemplate that a mortgage may be foreclosed without making them parties. In that case, of course, they would not be barred by the decree, the general policy of the law being that no one shall be concluded without giving him an opportunity to assert and protect his rights." *Rankin v. Major*, 9 Iowa, 297. A person executed to B. two notes, — one at six months, and the other at twelve months, — and gave a mortgage to B. to secure them. B. assigned the second note to R., and B. and R. united in an action to foreclose the mortgage. Held, that they could not thus unite as plaintiffs, because the indebtedness had been severed, and the demands are distinct and separate. The rights of all can, however, be protected in one action. If either brings an action to foreclose, he can make the other a defendant, and the latter can assert his

¹ *Hall v. Nelson*, 23 Barb. 88; 14 How. Pr. 82; *Cord v. Hirsch*, 17 Wisc. 408.

defendants merely.¹ This latter view is, in my opinion, clearly incorrect, since it leads to the inevitable conclusion that there

right by an answer in the nature of a cross bill, and the decree will award the proceeds to both. Under the Iowa law, the proceeds are to be applied to the payment of the first note in full, and the surplus to the second note. *Crow v. Vance*, 4 Iowa, 484; *Veagh v. Schaup*, 8 Iowa, 194; *Bates v. Ruddick*, 2 Iowa, 428. Subsequent incumbrancers who are not made parties are not concluded by the decree and sale. The last-named case contains an exhaustive discussion of the doctrine. *Sands v. Wood*, 1 Iowa, 283. A person executed a note and a mortgage to secure it. The payee indorsed the note, and assigned the mortgage to the plaintiff, who brings a foreclosure action against the mortgagor and the indorser (the mortgagee), and prays judgment against both for the amount of the note. Held improper. The action to foreclose should have been against the mortgagor alone. An action on the note might be brought against both the maker and the indorser; but the two actions cannot be joined. *Murray v. Catlett*, 4 Greene (Ia.), 108. A mortgagor who has conveyed his equity of redemption is not a necessary defendant. *Williams v. Meeker*, 20 Iowa, 292, 294. Same point as in the last case. The defendant, who is owner of the premises, cannot object that the mortgagor has not been made a party defendant. *Powell v. Ross*, 4 Cal. 197. When a mortgage of husband's land is executed by him and his wife, she is not a necessary party defendant in a foreclosure suit. Her joining in the mortgage was not necessary unless the land was her separate property. This decision is based upon the local law of California, which is quite different from the common-law doctrines in relation to dower. *Belloc v. Rogers*, 9 Cal. 123. When a mortgagor has conveyed the land, and afterwards dies, his adminis-

trator is a necessary party if the plaintiff seeks to recover a judgment for a deficiency; but if the plaintiff elects to rely upon the proceeds of the mortgaged premises, and asks no such judgment, the administrator is not a necessary defendant; citing and approving *Bigelow v. Bush*, 6 Paige, 345; *Harwood v. Marye*, 8 Cal. 580. When a mortgagor dies owning the land, his administrator or executor is a necessary defendant in California; the heir is not a sufficient party. In California the land goes to the administrator or executor as well as the personal property, and the title thereto remains in him until the estate is settled. *Hayward v. Stearns*, 39 Cal. 58, 60. Subsequent incumbrancers are not necessary parties, although their rights are unaffected by the decree unless they are joined. *Davenport v. Turpin*, 48 Cal. 597, 601. The title of a person to whom the mortgagor had conveyed the land is not affected by the decree in an action in which he was not made a party defendant; citing *Carpenter v. Williamson*, 25 Cal. 161; *Schadt v. Heppe*, 45 Cal. 433, 437. A mortgage was given by husband and wife on land which was common property. The husband died, and, under the peculiar law of California, these mortgaged premises were set off for the use of the widow and infant child. An action was afterwards brought to foreclose the mortgage, and it was held that the administrator was, under the circumstances, neither a necessary nor even proper party defendant. The premises when thus set off ceased at once to be assets of the estate, and passed beyond all control of the administrator or of the Probate Court. The present right to the possession of the land at once passed to the widow and child, and they thenceforth held it subject to the mortgage, but free from all other

¹ *Sumner v. Coleman*, 20 Ind. 486; *Semple v. Lee*, 13 Iowa, 304. In the last case, the mortgagor and the owner to whom the land had been conveyed were both joined, and the court said the owner was a proper party, and the mortgagor

was not a necessary one. The absurd result was thus reached that there was no necessary defendant; for if these persons were only proper ones, they might be omitted, and the suit go on without any defendant.

may be an action without any necessary defendant. If, however, the mortgagor has conveyed away only a portion of the premises and remains owner of the residue, the grantee of the part so conveyed is not a necessary defendant. The suit against the mortgagor alone is not a nullity; there is a title in him for the decree of sale to act upon; but the rights of the grantee would be unaffected.¹ It follows as an evident corollary from the proposition just stated, that the mortgagor who has conveyed away the whole

claims against the estate. For the purpose of a mere foreclosure, therefore, the administrator was no longer a necessary or proper party to the action. Ordinarily, it will be remembered, the administrator is an indispensable party, since the title to the lands, as well as to the chattels, vests in him, and not in the heir, until the estate is settled and distribution made. *Morris v. Wheeler*, 45 N. Y. 708. In an action to foreclose a mortgage against the owner, who was a subsequent grantee, he set up in his answer that a certain named person was a judgment creditor of a former owner of the mortgaged premises, that his judgment was a lien thereon, and that he had not been made a party. The court held that such judgment creditor was a necessary party, and that a decree of foreclosure ought not to be rendered in favor of the plaintiff because he had not been made a defendant (!) This is certainly a most extraordinary decision; it is in direct conflict with other decisions made by the same court, and is an utter confounding of all distinctions between necessary and proper parties. The decision is so clearly erroneous that it can only be regarded as an inadvertence. *Key v. Whittaker*, 44 N. Y. 565. In a foreclosure suit against the mortgagor and a subsequent grantee and owner, the latter set up in his answer, among other defences, that his wife, who has an inchoate dower right in the premises, is not a party, and that she is a necessary defendant. The answer was struck out as frivolous. The court, per Hunt J., said (p. 572): "To sustain a foreclosure suit the mortgagor is a necessary party, and generally the only necessary one. Others may be joined if it is desired to

cut off their interests, as a wife, a subsequent purchaser, or subsequent mortgagee. They are not indispensable parties. The action is good without them; and the only effect of their absence is that their interests are not affected by the proceeding. Such was the condition of *Mrs. W.* [the wife in question], even if her husband was a subsequent purchaser or owner." This decision is entirely inconsistent with the case last before cited. While the opinion of Mr. Justice Hunt, as to subsequent incumbrancers, is entirely correct, he has fallen into an obvious error when he declares that the mortgagor is always a necessary party. *Brundage v. Domestic and For. Miss. Soc.*, 60 Barb. 204. In a foreclosure action, a person who claims in opposition to the title of the mortgagor cannot be made a defendant so as to litigate his title and settle it. *Leggett v. Mutual Life Ins. Co.*, 64 Barb. 23, 36. A mortgagor died. By his will, after certain legacies, he left the rest and residue, including the mortgaged premises, to trustees in trust for his children for life, remainder in fee to his grandchildren. In a suit to foreclose the mortgage, the trustees were made defendants, but the grandchildren were not. Held, that the grandchildren were necessary parties in order to cut off their right of redemption; the trustees did not, and could not represent them. *Daly v. Burchell*, 18 Abb. Pr. n. s. 264, 268. After the mortgagor has conveyed away the land, he is not a necessary defendant; and if he dies, his heirs are not; citing *Paton v. Murray*, 6 Paige, 474; *Van Nest v. Latson*, 19 Barb. 604.

¹ *Douglass v. Bishop*, 27 Iowa, 214, 216. There is certainly a plain distinction between this case and the one where

the entire premises are conveyed by the mortgagor.

of the mortgaged premises is no longer a *necessary* party defendant in a foreclosure action, that is, he is not indispensable to the rendition of a simple judgment of sale, if no decree for a deficiency is asked.¹ He is however an eminently proper party; and if the plaintiff wishes a personal judgment for any deficiency which may arise upon the sale, he, or his personal representative if he is dead, is a necessary party, and may defend the action, and defeat the same by any competent defence which he may establish.² The decisions do not make any distinction between the case in which the mortgagor has simply conveyed the land incumbered by the mortgage, and that in which the grantee has assumed to pay the mortgage debt, and in fact there is and can be no such distinction. Whatever arrangement the mortgagor may make with his grantee, he cannot by his own act free himself from his liability to the holder of the mortgage; he will therefore remain liable, either as principal debtor or as surety for the grantee who has assumed the payment, and will continue subject to a judgment for a deficiency.³

§ 337. The same principle is of universal application, and embraces all successive grantees of the premises who have made themselves personally liable for the mortgage debt. Thus, if the mortgagor conveys the premises to A., who takes them simply burdened by the lien, but does not assume and agree to pay the debt, and A. afterwards conveys in the same manner to B., who again conveys to C. who is the owner when the foreclosure is commenced, A. and B. are plainly neither necessary nor proper parties; they have retained no interest in the land, and were never personally responsible for the debt. If, on the other hand, in this series of conveyances, A., B., and C. had each in turn assumed and agreed to pay the mortgage debt, C. would be the *necessary* defendant in any action to foreclose, because he is the owner of the land. The mortgagor, A. and B. would be proper defendants, because they are personally liable for the debt. The mortgagor's liability was created by the original instrument, bond, note, or otherwise, and he did not become freed therefrom

¹ *Drury v. Clark*, 16 How. Pr. 424; *Lee*, 13 Iowa, 304; *Murray v. Cadett*, *Delaplaine v. Lewis*, 19 Wisc. 476, and cases cited; *Stevens v. Campbell*, 21 Ind. 471; *Burkham v. Beaver*, 17 Ind. 367; *Huston v. Stringham*, 21 Iowa, 86; *Johnson v. Monell*, 18 Iowa, 300; *Semple v.*

Greene (1a.), 108; *Belloc v. Rogers*, 9 Cal. 123; *Williams v. Meeker*, 29 Iowa, 292, 294; *Story*, Eq. Pl. § 197.

² See cases cited in last note.

³ See same cases last cited.

because others also assumed it. A.'s and B.'s liability was created by their voluntary assumption, and having been once incurred, it could not be thrown off without the consent of the creditor. If the plaintiff therefore demands a judgment for deficiency, and desires to make his security as complete as possible, he may join the mortgagor and A. and B. as codefendants in the suit to foreclose.¹ If the mortgagor has conveyed his entire interest and afterwards dies, his administrator or executor must be joined as a defendant if a judgment for deficiency is prayed, and may be admitted to contest the validity of the mortgage and of the debt it is given to secure.² It is even said by some courts that the personal representative of the deceased mortgagor is a necessary party defendant with the heirs and widow.³ When the mortgagor dies intestate owning the land, or when any subsequent owner thus dies, his heirs are indispensable parties; and if the objection to their nonjoinder has not been taken, the court will of its own motion order them to be brought in as defendants. No effectual decree of sale can be made without them.⁴

§ 338. In California, the personal representative of a deceased person succeeds at once to all lands as well as personal property; the title vests in him for purposes of administration; and if an owner of mortgaged land dies, his executor or administrator is therefore an indispensable party defendant.⁵ A mortgagor having conveyed the land to assignees in trust for the benefit of creditors, judgment creditors whose judgments were recovered subsequent to such assignment, and which were therefore not direct liens on the land, were held to be proper parties defendant in an action brought to foreclose the mortgage against the mortgagor and the trustees. These trustees having suffered a default, the judgment creditors were permitted to intervene and to contest the

¹ See same cases last cited.

² *Huston v. Stringham*, 21 Iowa, 36; *Darlington v. Effey*, 13 Iowa, 177.

³ *Miles v. Smith*, 22 Mo. 502. If the plaintiff seeks a personal judgment for a deficiency, the personal representative of a deceased mortgagor is of course a necessary defendant; but if the plaintiff demands no such judgment, and is contented with the security of the land alone, it seems, the personal representative is not a necessary party. *Story's Eq. Pl.*

§§ 196, 200; *Duncombe v. Hansley*, 8 P. Wms. 333 (n.); *Fell v. Brown*, 2 Bro. C. C. 276; *Bradshaw v. Outram*, 13 Ves. 284.

⁴ *Muir v. Gibson*, 8 Ind. 187; *Story's Eq. Pl.*, § 196. In North Carolina, when the mortgagee dies, his heirs are, in general, necessary parties plaintiffs or defendants; but there are exceptions, as where the mortgagee had assigned, and died insolvent, leaving non-resident heirs. *Etheridge v. Vernoy*, 71 N. C. 184, 186, 187.

⁵ *Harwood v. Marye*, 8 Cal. 580.

validity of the mortgage and of the debt which it secured by setting up usury.¹ The general proposition was announced by the court, that the *cestuis que trustent* are proper defendants as well as the trustees. When a mortgage was given to secure a note payable to the order of the mortgagee, and the latter indorsed and transferred the note and assigned the mortgage, the assignee cannot maintain an action against the mortgagor and maker of the note, and the indorser of the note (the mortgagee), to foreclose the mortgage and to obtain judgment against both for either the whole amount of the note or for the deficiency. A legal action may be brought against both on the note, but a foreclosure must be against the mortgagor alone.² This last rule is exactly otherwise in Minnesota by virtue of an express statute. If the mortgage debt is secured by the obligation of any person other than the mortgagor, he may be joined as a defendant in the foreclosure suit, and a judgment for deficiency may be rendered against him alone, or jointly with the mortgagor, as the case may be.³

§ 339. The special provisions in the codes of some States requiring the assignor of a thing in action to be made a defendant under certain circumstances in a suit by the assignee, affects the general doctrine as to parties in foreclosure actions in those States. These provisions, it will be remembered, require the assignor to be made a party "when the thing in action is not assignable by indorsement," or when it is not a negotiable instrument, or when the assignment is not expressly authorized by statute so as to transfer the legal title to the assignee. It has been held in States where these provisions are in force, that if a mortgage is given to secure a negotiable note, and this note is transferred in the usual manner by indorsement, although there is no written assignment of the mortgage, the assignor need not be made a defendant. The transfer of the note by indorsement carries with it the title to the mortgage, and the assignee thus becomes legal owner of both by a form and mode of transfer which permits the action to be brought without the assignor as a party defendant.⁴ On the other hand, if the mortgage alone is

¹ Union Bank v. Bell, 14 Ohio St. 200.

² Sands v. Wood, 1 Iowa, 263.

³ Nichols v. Randall, 5 Minn. 304, 308.

⁴ Gower v. Howe, 20 Ind. 396. Mort-

gagees who have assigned their entire interest are not necessary parties. Pullen v. Heron Min. Co., 71 N. C. 567.

assigned by a written transfer, while the evidence of the debt, for example a bond, is merely transferred by delivery, the assignor, who might be the mortgagee, is a necessary defendant under the provision above referred to.¹ This decision would undoubtedly embrace all cases where the instrument which is the principal evidence of debt, whether bond or negotiable note, unless the latter be payable to bearer, is transferred by delivery merely. If a note secured by mortgage is payable to bearer, so that the legal title will pass by mere delivery, it would seem the assignor need not be made a defendant. Such a note being negotiable, the case falls directly within the language of the provision as it is found in several codes.

§ 340. When a mortgage is given to secure a series of notes made by the mortgagor, having different periods of time to run, as, for example, one, two, and three years, the proceeds of the land when sold upon foreclosure are to be applied to the payment of these notes in the order in which they fall due; that is, the one which first falls due is to be paid in full, and the surplus, if any, goes to the payment of the second, and so on. If the mortgagee assigns one or more of such notes, and retains the others, or if the notes are separately assigned to different persons, the holders cannot unite as coplaintiffs in an action to foreclose, because the debt has been severed and their interests are separate and distinct. Either holder, however, may bring an action to foreclose, and may make the other holder (or holders) defendant, and such defendant can set up his rights in his answer. The facts being thus presented, the decree can adjust the various interests and equities of the different holders, and apportion the proceeds according to the priorities. The foregoing rules are established in Iowa.²

§ 341. An occupant of the land, that is a person in possession without alleging the title to be in himself, is not a necessary party; his rights, however, whatever they may be, will not be affected by the decree in a suit to which he was not made a defendant.³ The complaint or petition must allege in respect of

¹ *Holdridge v. Sweet*, 23 Ind. 118; *French v. Turner*, 15 Ind. 59. See *Kittle v. Van Dyck*, 1 Sandf. Ch. 76. may have affirmative relief as a defendant, it is difficult to see any substantial reason why he should not be permitted to

² *Rankin v. Major*, 9 Iowa, 297. It must be confessed this is a sacrifice of substance to form. If the assignee

join as plaintiff in the first instance. ³ *Suiter v. Turner*, 10 Iowa, 517.

every person made a defendant, that he has or claims some interest adverse to the plaintiff, or that he is a necessary party to a complete settlement of the questions involved in the controversy. A defendant concerning whom no such averment is made, may demur for want of sufficient facts.¹ Parties remotely and contingently interested in the result, although having no estate in or lien on the land, may be proper defendants in order to the protection of their rights and the settlement of the questions.²

§ 342. It is a rule universally established that all subsequent incumbrancers, who are holders of general or specific liens on the land, whether mortgagees, judgment creditors, or whatever be the nature of the lien if it can be enforced against the land, are not necessary parties in the sense that their presence is indispensable to the rendition of a decree of sale; but they are necessary parties defendant to the recovery of a judgment which shall give to the purchaser thereunder a title free from their liens and incumbrances. If they are not joined as defendants, their rights are unaffected; their liens remain undisturbed and continue upon the land while in the hands of the purchaser; and they retain the right of redemption from the holder of the mortgage before the sale, and from the purchaser after the sale.³ It is not, in general, considered that prior incumbrancers are even proper defendants, for as their liens are paramount to the mortgage, they cannot be in any manner affected by the action or the decree therein.⁴ It is said, in Iowa, however, that they are proper

¹ *Martin v. Noble*, 29 Ind. 216. It is not necessary to allege any particular interest. A general averment, as stated in the text, is sufficient in respect to all the defendants, except those against whom a personal judgment is asked, and those who are owners of the land. See *Anthony v. Nye*, 30 Cal. 401.

² See, as illustrations, *Johnson v. Britton*, 23 Ind. 105; *Parrott v. Hughes*, 10 Iowa, 459.

³ *Kay v. Whittaker*, 44 N. Y. 565, 572; *Bloomer v. Sturges*, 58 N. Y. 168; *Rathbone v. Hooney*, 58 N. Y. 468; *Gaines v. Walker*, 16 Ind. 361; *Proctor v. Baker*, 15 Ind. 178; *Wright v. Howell*, 85 Iowa, 288, 293; *Newcomb v. Dewey*, 27 Iowa, 381; *Anson v. Anson*, 20 Iowa, 55; *Ten Eyck v. Casad*, 15 Iowa, 524; *Knowles v. Rablin*, 20 Iowa, 101; *Chase v. Abbott*,

20 Iowa, 154; *Street v. Beal*, 16 Iowa, 68; *Heimstreet v. Winnie*, 10 Iowa, 430; *Veach v. Schaup*, 3 Iowa, 194; *Bates v. Ruddick*, 2 Iowa, 423; *Hayward v. Stearns*, 39 Cal. 58, 60; *Green v. Dixon*, 9 Wisc. 532; *Story's Eq. Pl.*, § 193; *Haines v. Beach*, 3 Johns. Ch. 459; *Dra-per v. Lord Clarendon*, 2 Vern. 518; *Lomax v. Hide*, 2 Vern. 185; *Godfrey v. Chadwell*, 2 Vern. 601; *Morret v. West-erne*, 2 Vern. 663; *Rolleston v. Morton*, 1 Dr. & W. 171; *Besser v. Hawthorne*, 3 Oreg. 129. See, however, *per contra*, *Morris v. Wheeler*, 45 N. Y. 708, — a clearly erroneous decision.

⁴ *Story's Eq. Pl.*, § 193; *Rose v. Page*, 2 Sim. 471; *Delabere v. Norwood*, 3 Swanst. 144, n; *Wakeman v. Grover*, 4 Paige, 23; *Parker v. Fuller*, 1 Russ. & My. 656; *Hagan v. Walker*, 14 How.

parties.¹ If a mortgage is given by a husband and wife on lands which are her separate estate, he is a necessary codefendant with his wife, except in the very few States whose statutes expressly exclude him in actions having reference to the wife's separate property.² If he united with the wife in the note, bond, or other obligation secured by the mortgage, he is a proper defendant in Minnesota, for the further reason that a judgment for deficiency may be rendered against him in the action.³

§ 348. In regard to the necessity or propriety of joining the wife of the mortgagor, or of any subsequent owner of the mortgaged premises, there is some conflict among the decisions. The solution of this question depends mainly upon the law of the State regulating the wife's right of dower. In most of the States the common-law doctrines as to dower prevail without substantial alteration. In some, however, they have been entirely abrogated, or at least radically changed. As at the common law, the wife's inchoate dower right attached to all lands owned in fee by the husband during the marriage, any mortgage, except for purchase-money, given by the husband in which the wife does not join, is subject to her dower right. When such a mortgage — not for purchase-money — is executed by the husband alone, a foreclosure thereof by an action in which she is even made a party defendant, does not affect her rights; she can assert her claim to dower in the land after her husband's death without redemption; the decree as to her is a mere nullity.⁴ If the wife unites with her husband in executing the mortgage, her dower right becomes subject to the mortgage lien; in other words, she is entitled to dower in the equity of redemption. This entitles her to redeem upon the same principle that any other junior incumbrancer is thus entitled. In all those States where the common-law doctrines as to dower have not been abrogated, the wife of the mortgagor who has united in executing the mortgage, though not an absolutely necessary party, must be made a defendant in order to cut off her right of redemption. If not a

U. S. 87; *Richards v. Cooper*, 5 Beav.

304; *Arnold v. Bainbriggs*, 2 DeG., F. &

J. 92; *Audsley v. Horn*, 26 Beav. 195;

1 DeG., F. & J. 226; *Person v. Merrick*,

5 Wisc. 231; *Wright v. Bundy*, 11 Ind.

398; *Rathbone v. Hooney*, 58 N. Y. 463.

¹ *Standish v. Dow*, 21 Iowa, 363;
Heimstreet v. Winnie, 10 Iowa, 430.

² *Wolf v. Banning*, 8 Minn. 202, 204.

³ *Ibid.*

⁴ *Moomey v. Maas*, 22 Iowa, 880;
Merchants Bank v. Thomson, 55 N. Y.
7, 11.

party to the foreclosure suit, she may come in and redeem from the purchaser.¹ The same is, of course, true of any owner to whom the land or a part thereof has been conveyed, subject to the mortgage, and who remains owner at the time of commencing the action to foreclose.² It is not necessary to set out the wife's interest in detail in the plaintiff's pleading; it is sufficient to aver in the usual general formula that she has or claims an interest in the land adverse to the plaintiff.³ A contrary rule prevails in a few States in which it is held that the wife, under the circumstances mentioned, need not be made a defendant.⁴ This ruling must be based upon the local law of dower radically different from the common law.

§ 344. There is a marked conflict in the decisions defining the wife's right under a purchase-money mortgage. One theory holds that the legal position of a wife whose husband has executed a purchase-money mortgage in which she did not unite, is exactly the same as that of a wife who has united with her husband in executing a mortgage not given for purchase-money. The lien of the mortgage is, of course, paramount to the dower interest, but she still has a right of redemption, and, in order to cut this off, she must be made a defendant in the foreclosure action.⁵ The same rule also applies to the wife of the person to whom the land or a part of it has been conveyed, subject to a purchase-money mortgage, and who is owner at the time of the foreclosure.⁶ The other theory denies that the wife whose husband executes a purchase-money mortgage in which she does not join, has any interest in the land, or any right of redemption. According to this view, she need not be made a defendant in the action to foreclose, and is cut off by a decree and sale, although omitted as a party.⁷ When a trustee of a married woman purchased lands in trust for her, and gave a purchase-money mortgage therefor, it was held, in Nevada, that the wife and her hus-

¹ *McArthur v. Franklin*, 15 Ohio St. 485; 16 ib. 193; *Chambers v. Nicholson*, 30 Ind. 349; *Chase v. Abbott*, 20 Iowa, 154; *Anthony v. Nye*, 30 Cal. 401; *Mills v. Van Voorhies*, 20 N. Y. 412. For the peculiar law of North Carolina, see *Creedy v. Pearce*, 69 N. C. 67; *Etheridge v. Vernoy*, 71 N. C. 184, 185-187.

² *Watt v. Alvord*, 25 Ind. 533, and cases last cited.

³ *Anthony v. Nye*, 30 Cal. 401.

⁴ *Thornton v. Pigg*, 24 Mo. 249; *Riddick v. Walsh*, 15 Mo. 538; *Powell v. Ross*, 4 Cal. 197. This last case cannot be reconciled with *Anthony v. Nye*, *supra*.

⁵ *Mills v. Van Voorhies*, 20 N. Y. 412.

⁶ *Ibid*.

⁷ *Fletcher v. Holmes*, 32 Ind. 497, per *Elliott J.*; *Etheridge v. Vernoy*, 71 N. C. 184-186.

band were both necessary defendants in an action brought to foreclose the mortgage.¹

§ 345. Under the law of California in respect to homesteads, it is held that the husband and wife must both join in a mortgage of the homestead in order that it should have any validity as against either; and of course the wife is a necessary defendant in an action to foreclose such a mortgage in which she has joined.² In an action to foreclose a mortgage, a person who sets up a claim to the land adverse and paramount to the title of the mortgagor, and who therefore denies the efficacy of the mortgage lien, cannot properly be joined as a codefendant by the plaintiff. Such an adverse claim to the land in opposition to the mortgage cannot be tried in the equitable action to foreclose. So far as mere legal rights are concerned in such an action, the only proper parties are the mortgagor and the mortgagee, and those who have acquired rights under them subsequent to the mortgage. The mortgagee or holder of the mortgage cannot make one who claims prior and adversely to the title of the mortgagor a defendant for the purpose of trying the validity of his adverse claim.³ In Iowa, a trust-deed of land or of chattels intended as security for a debt, is by statute regarded as a mortgage, and may be foreclosed by action in the same manner as a mortgage.⁴ A subsequent incumbrancer, as, for example, a mortgagee, who has not been made a party to the foreclosure of a prior mortgage, may redeem the land from the sale, and, in his action to compel the redemption, he should make the mortgagor and his prior mortgagee, and the purchaser at the sale and his grantees, if any, the parties defendant.⁵ The grantee of the purchaser is an indispensable defendant in such an action; and if his omission is

¹ *Mavrich v. Grier*, 3 Nev. 52. And when mortgaged land is conveyed in trust, or vested in trustees, the *cestuis que trustent* are necessary defendants in a suit to foreclose. *Clark v. Rayburn*, 8 Wall. 313; *Faithful v. Hunt*, 3 Anat. 751; *Calverley v. Phelps*, 6 Mad. 229; *Osbourn v. Fallows*, 1 R. & M. 741; *Newton v. Earl Egmont*, 4 Sim. 574, 584; 5 Sim. 180, 135; *Coles v. Forrest*, 10 Beav. 552, 557; *Goldemid v. Stonehewer*, 9 Hare App. 38; *Story's Eq. Pl.*, §§ 206, 207.

² *Revalk v. Kraemer*, 8 Cal. 66; *Marks v. Marsh*, 9 Cal. 96; *Moss v. Warner*, 10 Cal. 296; *Sargent v. Wilson*, 5 Cal. 504.

³ *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 687, per *Walworth Chan.*; *Corning v. Smith*, 6 N. Y. 82; *Palmer v. Yager*, 20 Wisc. 91, 108, per *Dixon C. J.*; *Pelton v. Farmin*, 18 Wisc. 222.

⁴ *Darlington v. Efev*, 18 Iowa, 177. Trust-deeds appear to be used in place of mortgages in several other of the Western States.

⁵ *Anson v. Anson*, 20 Iowa, 55; *Knowles v. Rablin*, 20 Iowa, 101; *Street v. Beal*, 16 Iowa, 68; *Burnap v. Cook*, 16 Iowa, 149.

properly objected to by the actual defendant, the action must fail.¹

§ 346. III. *Creditors' Actions ; and Actions by or on Behalf of Creditors to set aside Fraudulent Transfers of their Debtors.* It is not within the scope of this work to inquire into the nature of creditors' suits, nor to discuss the question when and under what circumstances they may be maintained. My only present concern is with respect to the proper selection of parties defendant, whenever the actions themselves may be properly brought. The general purpose of a creditor's suit proper is to reach, at the instance of a judgment creditor whose legal remedies of judgment and execution thereon have been exhausted, the assets of the judgment debtor, which, either by reason of their intrinsic nature, or by reason of their transfer alleged to have been fraudulent as against the creditor, are or have been placed beyond the reach of an execution at law, and which are therefore denominated equitable assets. Certain species of property, as, for example, things in action, although in the ownership of the debtor, cannot be seized on execution. The distinctive feature of the action, however, is to reach land, and sometimes chattels, which the debtor, having owned by a legal title, has transferred to some grantee or assignee in fraud of his creditors ; or to reach such land, and sometimes personal property, the legal title to which stands, and always has stood, in other parties, while by reason of alleged facts the equitable ownership, at least so far as the creditors are concerned, is held by the debtor himself, and the property is thus, as is alleged, liable to be taken and applied to the discharge of the creditor's demands. Under what circumstances a transfer of property is fraudulent as against the creditors, or the equitable ownership is held by the debtor while the legal title is vested in another, it is not now the place to inquire. Assuming that such circumstances exist, and that when they exist an action may be maintained by the judgment creditor whose legal remedies are exhausted, to reach the property and have it applied in some manner to the payment of his demands, it may be asked, Who should be made parties defendant in such an action ? The answer to this question is plain, and the

¹ Winslow v. Clark, 47 N. Y. 261, 263 ; for fraud, the purchaser is a necessary citing Dias v. Merle, 4 Paige, 259. And defendant. Wilson v. Bell, 17 Minn. 61, in an action to set aside a foreclosure sale 64.

rule has been well established, depending as it does upon the most evident principles of equity jurisprudence. The creditor's suit, properly so called, and which has been thus described in general terms, should not be confounded with actions that creditors may sometimes bring, based upon the law of trusts and the right of a *cestui que trust* to compel the performance of his duty by a trustee.

§ 347. In an action by a judgment creditor to reach the equitable assets of the debtor in his own hands, or to reach property which has been transferred to other persons, or property which is held by other persons under such a state of facts that the equitable ownership is vested in the debtor, the judgment debtor is himself an indispensable party defendant, and the suit cannot be carried to final judgment without him. In some cases, as when the property has been assigned at different times to different assignees, or is held by different legal owners, who are all made codefendants, he is the very link which unites them all together, the common centre to which they are all connected, and it is because he is a party defendant that they can all be joined in one action as codefendants.¹ Even if the objection to his non-joinder be not taken by the actual defendants, the court will on its own motion order him to be brought in.² If the judgment debtor himself is dead, his administrator or executor is an indispensable defendant;³ and if the objection be taken for the first time in the appellate court, the cause will be remanded in order that he may be added as a defendant.⁴ When, however, the debtor conveyed his land to A. for the purpose of a second conveyance to his own wife in fraud of his creditors, which second conveyance was made, and the debtor afterwards died, it was held that his heirs were neither necessary nor proper parties to the creditor's action brought to set aside these conveyances. "The conveyance of their ancestor, though fraudulent, concludes them, and effectually cuts off all their interest in the property."⁵

¹ *Lawrence v. Bank of the Republic*, 35 N. Y. 320; *Shaver v. Brainard*, 29 Barb. 25; *Wallace v. Eaton*, 5 How. Pr. 99; *Logan v. Hale*, 42 Cal. 645; *Allison v. Weller*, 6 N. Y. Sup. Ct. 291; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190.

² *Shaver v. Brainard*, 29 Barb. 25. It

was said that a decree without his presence is impossible.

³ *Alexander v. Quigley*, 2 Duvall (Ky.), 300; *Postlewaite v. Howes*, 3 Iowa, 365; *Coates v. Day*, 9 Mo. 315.

⁴ *Postlewaite v. Howes*, 3 Iowa, 365.

⁵ *Harlin v. Stevenson*, 30 Iowa, 371,

§ 348. If the object of the action be to reach property which has been assigned by the debtor, the assignee is a necessary party defendant, even if he be a non-resident of the State ;¹ and on the same principle, if the plaintiff seek to reach property of which the legal title is in a third person, but the equitable ownership of which is alleged to be in the debtor, such holder of the legal title must be a defendant.² When the debtor conveyed land to a third person with the purpose that such person should at once convey the same to the debtor's wife, which second conveyance was forthwith made, it was held, in an action against the debtor and his wife to reach the land in her hands, that the first grantee was a necessary party defendant.³ A debtor fraudulently conveyed land to A., and took back a purchase-money mortgage which he assigned to B. In an action to set aside the conveyance, or to reach the mortgage, it was held that the debtor and both A. and B. were proper and necessary parties defendant.⁴

§ 349. When the action is brought for either of these objects, if the debtor has at different times assigned, in alleged fraud of his creditors, different parcels of his property to different assignees, or if different parcels of property are held by different persons in alleged fraud of the debtor's creditors, so that the equitable ownership is claimed to be vested in him, all of these assignees, or all of these holders of the legal title, may be joined with the debtor as codefendants in one action.⁵ The reason given for this rule permitting separate assignees or holders of the legal title to be joined, although they take by different conveyances and at different times, is, "that they all have a common interest centering in the point at issue in the cause ; so that, while the title to one piece of property is in one defendant, and the title to some other distinct piece is in another defendant, yet these various titles were taken and are now held for a common purpose, and to

¹ *Gray v. Schenck*, 4 N. Y. 460.

² *Ogle v. Clough*, 2 Duv. (Ky.) 145.

³ *Bennett v. McGuire*, 5 Lans. 188, 188. The necessity of making this grantee a defendant is not apparent. It is true, *his* deed is sought to be set aside, but he has no interest whatever in the result ; all title has passed out of him, and he cannot be affected by the judgment. See *Spicer v. Hunter*, 14 Abb. Pr. 4.

⁴ *Foster v. Townshend*, 12 Abb. Pr. x. s. 469. When a debtor had conveyed

land in fraud of his creditors, and the grantee had executed a mortgage thereon, the mortgagee was held a necessary defendant in a creditor's suit to set aside the conveyance. *Copis v. Middleton*, 2 Mad. 410.

⁵ *Morton v. Weil*, 11 Abb. Pr. 421 ; *Reed v. Stryker*, 12 Abb. Pr. 47 ; *Jacot v. Boyle*, 18 How. Pr. 106 ; *Hamlin v. Wright*, 23 Wisc. 491 ; *Winslow v. Dousman*, 18 Wisc. 466 ; *North v. Bradway*, 9 Minn. 188.

accomplish the same fraudulent end. All are privy to have been concerned in acts tending to the same illegal result. The matters are not distinct, but are in truth all connected with the same fraudulent transaction in which all the defendants have participated.¹

§ 350. In an action brought by or on behalf of a judgment creditor, to reach a fund in the hands of an express trustee for the debtor, such debtor is a necessary defendant, and should be joined with the trustee; he is the person directly interested in the fund, and the one to be directly affected by the judgment.² When a creditor's suit was brought to reach property fraudulently transferred by the debtor, and the alleged fraudulent transfer was consummated through the means of a third person, who in good faith received a conveyance of the property in trust for the alleged fraudulent grantee, and who subsequently conveyed the same to such grantee in accordance with the trust, such third person was held not to be a proper defendant; there was simply no cause of action against him, because he was free from any fraudulent intent.³

§ 351. IV. *Actions relating to the Estates of Deceased Persons; in which Heirs, Next of Kin, and Personal Representatives are Parties.* The "administration suit" in chancery, by means of which the estates of deceased persons are usually settled in England, is uncommon, if not entirely unknown, in the United States. The actions which will fall under the above heading are almost entirely special cases, depending upon special circumstances: suits

¹ Winslow v. Dousman, 18 Wisc. 456. 462, per Cole J. In Hamlin v. Wright, 28 Wisc. 491, 494, Cole J. said: "The object of such a suit is to reach the property of the debtor, and the fact that all the grantees have become accessory to the fraudulent attempt of the debtor to place his property beyond the creditors, gives them such a common connection with the subject-matter of the suit that they may be joined, although the purchase of each was distinct from the others, and each is charged with only participating in the fraud in respect to his own purchase;" citing Brinkerhoff v. Brown, 6 Johns. Ch. R. 139, 157; Fellows v. Fellows, 4 Cow. 682; Boyd v. Hoyt, 5 Paige, 65; N. Y. & N. H. R. R. v. Schuyler, 17 N. Y. 592; Story's Eq. Pl., §§ 225, 226; Dix v.

Briggs, 9 Paige, 595; Sizer v. Miller, 9 Paige, 605.

² Vanderpoel v. Van Valkenburgh, 6 N. Y. 190.

³ Spicer v. Hunter, 14 Abb. Pr. 4. All the assets of a corporation having been divided among the stockholders, a judgment creditor of the corporation brought this action in the nature of a creditor's suit against a stockholder in order to recover the amount of her claim out of the assets received by him. It was held that the action could be maintained, and that other stockholders need not be joined as codefendants. Bartlett v. Drew, 67 N. Y. 587, 589. For a peculiar case of misjoinder of defendants in a creditor's action, see Gale v. Battin, 16 Minn. 148, 150.

by judgment creditors to reach the property of deceased debtors, or of beneficiaries to reach trust property held by deceased trustees, or of heirs or next of kin, or legatees, to set aside the fraudulent transactions of administrators and executors, and the like. It is almost impossible, therefore, to collect these various cases into any well-defined groups; each must stand upon its own facts, and will illustrate as far as possible the broad generalities of the equitable doctrine as to parties.

§ 352. A testator left real and personal property in fee to A., but if she should die without issue, \$10,000 of it were given over to B. The original executor of this will died leaving the trust fund mingled with his own property, and the whole passed to his executor, C. A. died without issue, and B. brought an action to recover the legacy of \$10,000, making C., the then executor of the original executor, the defendant. It was held by the Court of Appeals in New York, that C. was a necessary party, but that the administrator of A. was also a necessary defendant without whom the issues in the cause could not be decided.¹ "He [this administrator] is a trustee of the next of kin of A., and they are interested in the fund after satisfying all charges upon it, and have a right to be heard upon any claim which tends to take it away for the benefit of another or to reduce it."² In an action brought by one executor against his co-executor for an account, — the ground of the proceeding being the breach of his trust by the latter, and the misuse of funds belonging to the estate, — the legatees, next of kin, and creditors of the deceased are not necessary defendants unless the accounting is to be final; if it is made the final accounting and settlement of the trust, then all these persons must be brought in as defendants.³ The administrator in violation of his trust fraudulently conveyed lands of the estate to a person who was a participant in the fraud. This grantee died intestate. The children — the only heirs and next of kin — of the deceased original owner brought an action against the administrator and the heirs of the grantee, to set aside the fraudulent transfer, to compel a re-conveyance of the land, and for an accounting by the administrator. This action was held proper; the heirs of the grantee were held to be necessary defendants, and

¹ Trustees, &c. v. Kellogg, 16 N. Y. 88.

² Ibid. p. 96, per Denio J.

³ Wood v. Brown, 34 N. Y. 837.

properly united with the administrator.¹ And when in a similar case the fraudulent administrator had at different times conveyed portions of the land to different grantees, an action by the heirs of the deceased owner against the administrator and all of these grantees, was sustained. "If there is a common point of litigation, the decision of which affects the whole number of defendants, and will settle the rights of all, they may all be joined in the same proceeding."²

§ 353. An administrator is not a necessary party defendant unless some claim is made against the estate which he would have the right to resist, or unless the judgment would be in some manner prejudicial to the estate; *a fortiori*, he is not a necessary defendant when the immediate object of the action is to increase the amount of assets available to the payment of the debts of the deceased, even though the ultimate purpose of the proceeding may be the benefit of the creditor who prosecutes it. Thus, where the deceased in his lifetime had received an absolute deed of lands, which he did not put upon record, and had subsequently with a fraudulent intent destroyed this deed, and procured the grantor therein to execute another conveyance of the same land without consideration to a third person who took the same with full knowledge and collusively and put the same upon record, a judgment creditor of the deceased, whose judgment was recovered while the deceased held the deed to himself, brought an action against the second grantee and the heirs and widow of the deceased, seeking to set aside the second deed, and to establish the original title of the judgment debtor, and to enforce the lien of his own judgment upon the land; this action was held to have been properly brought against the defendants named. The administrator of the deceased was held not to be a necessary party defendant, because the proceeding was really for the benefit of the estate, and he could make no opposition if he were present.³

¹ *Bassett v. Warner*, 23 Wisc. 678. This case is plainly the same in principle as the suit by a judgment creditor against a fraudulent debtor and his grantee.

² *Bowers v. Keesecher*, 9 Iowa, 422, 424; citing *Story's Eq. Pl. §§ 284, 584*; *Bugbee v. Sargent*, 28 Me. 271; *Rayner v. Julian*, *Dickens*, 677; *Brinkerhoff v. Brown*, 6 Johns. Ch. R. 152; *Varick v. Smith*, 5 Paige, 160.

³ *Cornell v. Radway*, 22 Wisc. 260, 265, per Dixon C. J. It was said that the administrator or executor might bring the suit; but this authority did not take away the right of the creditor. R. S. of Wisconsin, ch. 100, §§ 16-18. But see *per contra*, as to the necessity of the personal representative being made a party in such actions, 1 Dan. Ch. Pl. (4th Am. ed.), p. 200, and cases cited.

§ 354. In actions by creditors against executors or administrators to recover debts alleged to be due from the deceased, or by the owners of the property to recover assets which had been in the possession of the deceased and apparently belong to his estate in the hands of his personal representatives, the legatees or next of kin are not necessary nor even proper parties defendant. The executors or administrators represent the estate. They can bring all suits to recover property in the hands of third persons alleged to belong to the estate, without joining the legatees or distributees as coplaintiffs, and on the same principle they can defend all actions brought against themselves, involving the ownership of property in their own hands, or the indebtedness of the estate, without the presence of legatees and next of kin as co-defendants. Thus in an action against executors to reach certain moneys and securities in their possession as apparent assets, but which it was claimed had been held by the testator in trust for the plaintiff and actually belonged to him, the legatees were held not to be necessary defendants.¹ And in an ordinary suit to recover a debt due from the deceased, brought against the administrator, the widow, and the next of kin, it was held that all these defendants, except the administrator, were improperly joined; he represents them, and his defence is their defence.²

§ 355. A different rule, however, prevails in an action by a distributee against the administrator, legatee against the executor, or beneficiary against the trustee, when the right asserted, if it exists at all, is also held by all the other parties similarly

¹ *King v. Lawrence*, 14 Wisc. 288.

² *Nelson v. Hart*, 8 Ind. 298. That the personal representatives are the only proper defendants in such actions, see *Story's Eq. Pl.*, §§ 104, 140; *Anon.* 1 Vern. 261; *Lawson v. Barker*, 1 Bro. C. C. 808; *Brown v. Dowthwaite*, 1 Mad. 446; *Jones v. How*, 7 Hare, 267; *Haycock v. Haycock*, 2 Ch. Cas. 124; *Jennings v. Paterson*, 15 Beav. 28; *Micklethwait v. Winstanley*, 18 W. R. 210; *Pritchard v. Hicks*, 1 Paige, 270; *Wiser v. Blachly*, 1 Johns. Ch. 487. In general, all the personal representatives must be joined. *Offey v. Jenny*, 3 Ch. Rep. 92; *Hamp v. Robinson*, 3 DeG., J. & S. 97. But if an executor has not proved, he need not be joined. *Strickland v. Strickland*, 12 Sim.

468; *Dyson v. Morris*, 1 Hare, 413. When, however, the estate has been distributed by a decree of the proper court, the executors or administrators need not be made defendants in an action brought by a creditor to reach the assets in the hands of the legatees or distributees. *Farrell v. Smith*, 2 B. & B. 337; *Clegg v. Rowland*, L. R. 3 Eq. 868. And, in an action by a creditor against the heirs and devisees of his deceased debtor, to make his claim out of the land of the deceased in their hands, the joinder of such heirs and devisees was held proper, since the judgment could provide for the order of their liabilities. *Rockwell v. Geery*, 6 N. Y. Sup. Ct. 687; *Schermerhorn v. Barhydt*, 9 Paige, 28.

situated with the one who sues, and the decision would in fact determine all their rights. In such a case, in order that the trustee may not be subjected to a multiplicity of suits, when the whole controversy could be decided in one, the equitable doctrine primarily requires that all the distributees, legatees, or beneficiaries should unite as plaintiffs; but if any refuse to join, they should be made defendants.¹ The statutes of several States permit an equitable action to be brought by the heirs of the testator to set aside a will of lands for any cause which can invalidate it. In such a suit the devisees under the will are indispensable defendants.² In fact, the executor can hardly be called a necessary party, for he takes no interest in the land. Conversely, in an action to reach the land of a deceased intestate, his heirs are indispensable defendants, without whom no decree can be made, and it is difficult to see how the administrator could be a necessary party.³

§ 356. *V. Actions involving Trusts, express or implied.* It is a universal and elementary rule that, in an action to enforce the performance of an express trust, the trustee is an indispensable defendant. This doctrine was applied in a case where a debtor had transferred personal property to a trustee upon trust to sell the same, and out of the proceeds to pay the demands of the creditor. The directions of the trust not having been complied with, the creditor brought an action against the debtor alone to foreclose the trust deed and for a sale of the goods. The trustee was held to be a necessary defendant.⁴ Where there were orig-

¹ *Dillon v. Bates*, 39 Mo. 292.

² *Eddie v. Parke's Executors*, 81 Mo. 513. The action was brought against the executors alone. See *Morse v. Morse*, 42 Ind. 865; *infra*, § 879, note.

³ *Mair v. Gibson*, 8 Ind. 187, 190. See *Silsbee v. Smith*, 60 Barb. 372. In an action for an account of personal estate which came into the hands of a deceased administrator or executor, his personal representatives are necessary defendants. As to the necessary parties in an action to construe a will, see *McKethan v. Ray*, 71 N. C. 165, 170.

⁴ *Tucker v. Silver*, 9 Iowa, 281, per *Wright C. J.* After stating the rule as laid down in the text, the court declares that it has not been changed by the new procedure. See also *McKinley v. Irvine*,

18 Ala. 681; *Cassiday v. McDaniel*, 8 B. Mon. 519; *Morrow v. Lawrence*, 7 Wisc. 574; *Jones v. Jones*, 3 Atk. 110. And, in general, all the trustees must be joined. *Coppard v. Allen*, 2 DeG., J. & S. 178. But a trustee who has never acted, and has released all his interest to his co-trustee, need not be made a party. *Richardson v. Hulbert*, 1 Anst. 65. When a trustee has assigned his interest in the trust estate, in general both he and the assignee should be defendants. *Story's Eq. Pl.*, § 209; *Bailey v. Inglee*, 2 Paige, 278. But if he has assigned his entire interest absolutely, the assignee alone should be sued, unless the assignment was a breach of trust. *Story's Eq. Pl.*, §§ 211, 213, 214; *Munch v. Cockerell*, 8 Sim. 219. As examples of this general

inally two or more trustees, and one or more have died, in an action by the beneficiary to enforce the trust, and especially if a violation thereof is alleged against all the trustees, the survivors and the personal representatives of the deceased not only may be united as codefendants,¹ but they *must* be so joined, or else no decree enforcing the trust can be made.²

§ 357. There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to

rule, when a demand is to be enforced against idiots, or lunatics, their committees or guardians must be sued, the lunatics or idiots themselves being proper but not necessary parties. *Beach v. Bradley*, 8 Paige, 146. And in suits relating to the property of insolvents or bankrupts, their assignees are necessary defendants. *Storm v. Davenport*, 1 Sandf. Ch. 185; *Movan v. Hays*, 1 Johns. Ch. 389; *Sells v. Hubbell*, 2 Johns. Ch. 394; *Botts v. Patton*, 10 B. Mon. 452. And the assignees are the only necessary defendants; neither the insolvents or bankrupts, nor the creditors, need be joined with them. *Collett v. Wollaston*, 3 Bro. C. C. 228; *Lloyd v. Lander*, 5 Mad. 282, 288; *Sells v. Hubbell*, 2 Johns. Ch. 394; *Springer v. Vanderpool*, 4 Edw. Ch. 382; *Wakeman v. Grover*, 4 Paige, 23; *Dias v. Bouchaud*, 10 Paige, 445.

¹ *Sortore v. Scott*, 6 Lans. 271, 276. It was held that the rule forbidding such union of parties in a legal action against joint debtors had no application to such an equitable suit. See also *Petrie v. Petrie*, 7 Lans. 90. This was an action to compel an accounting brought by one legatee against a surviving trustee and executor. There were two other trustees deceased, and their personal representatives had not been made parties; divers legatees also were not brought in. A demurrer, on the ground of the non-joinder, was sustained by the court at General Term. *Mullin P. J.* said (p. 95): "To an action to compel an accounting, all persons interested in the account should be made parties (*Story's Eq. Pl.*, § 219). Also, if the legatees who were paid gave agreements to refund, as they should do, they are necessary parties.

Also, the personal representatives of the deceased trustees (*King v. Talbot*, 40 N. Y. 76). And if there were no such representatives, they should be appointed, and then made parties. All the legatees should have been parties."

² *Sherman v. Parish*, 53 N. Y. 483, 490.

Action by a sole beneficiary against a trustee for an alleged breach of the trust. There had been other trustees who were dead, and their personal representatives were not made defendants. *Folger J.* said: "It is the principle of courts of equity, in cases of breach of trust, when no general rule or order of the court interferes, and when the facts of the case call for a contribution or recovery over, that all persons who should be before the court to enable it to make complete and final judgment, are necessary parties to the action. Nor has our mode of procedure abrogated the rule." He cites *Hill on Trustees*, 520, 521; *Perry on Trusts*, §§ 875, 876, 877; *Lewin on Trusts*, 845; *Munch v. Cockerell*, 8 Sim. 219; *Perry v. Knott*, 4 Beav. 179; *Shipton v. Rawlins*, 4 Hare, 619; *Cunningham v. Pell*, 6 Paige, 607; *New York code*, § 118. The court add the following very important rule: That, on timely objection to the want of necessary parties, if the plaintiff does not bring them in, the complaint must be dismissed, *but not absolutely*; the dismissal should be without prejudice. *The complaint, however, should not ever be thus dismissed if the cause can be made to stand over on terms, in order to enable the plaintiff to bring in the necessary parties.* This ruling is in exact conformity with the plain intent of the codes, and with the views expressed by me in the text in a former paragraph.

be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case, the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and defend for them. In the second, all the beneficiaries must be joined, if not as plaintiffs, then as defendants, so that the whole matter may be adjusted in one proceeding, and a multiplicity of suits avoided. The reason of this distinction is obvious. It is, that any one person interested in opposition to the trust has a right to test the validity thereof, and his voluntary action cannot be controlled by the will of others, while the trustees themselves are sufficient to represent and defend all the interests of those who claim under the trust. But when the trust is assented to, and the purpose is simply to carry out its provisions, all the beneficiaries are alike interested in that object and in reaching that same result, and it is just to the trustee that the controversy should be ended in one proceeding. As illustrations of this principle: In an action brought to set aside a trust deed made by a railroad company to a trustee for the benefit of bondholders, and to restrain a sale of the road thereunder, the beneficiaries under the trust were declared not to be necessary or even proper parties, and the application of one of them — a bondholder — to be admitted as a defendant was denied, although he alleged that the trustee intended to make no defence, and was actually colluding with the plaintiff and the company.¹ On the same principle, where a testator had devised all his lands to his executors with

¹ Winslow v. Minn., &c. R. R., 4 Minn. 313, 316. The suit was brought against the trustee and the company. Atwater J., after stating the question whether the applicant was a necessary defendant, said: "This action does not differ in substance from an ordinary creditor's bill to set aside a trust-deed for the benefit of creditors, or of *cestuis que trustent* sustaining other relations to the trustees. It is a general rule in equity that all persons materially interested either legally or beneficially in the subject-matter of the suit, are to be made parties to it either as plaintiffs or defendants, however numerous they may be, so that there may be a complete decree which shall bind them all.

But to this rule there are numerous exceptions. And it is held that the expression, 'all persons interested' must be parties to the suit, does not extend to all persons who may be consequentially interested;" citing Story's Eq. Pl., §§ 142, 149, 216. . . . "And the principle seems to be well settled that, in an action by a creditor to reach trust property in the hands of administrators or trustees who have control of, and whose duty it is to protect the property, the *cestuis que trustent* need not be joined as parties. The defence of the trustee is their defence, and their presence is not necessary to the protection of their interests."

power to sell and distribute the proceeds among his heirs, an action by a third person claiming to own part of these lands, denying that they belonged to the testator, and seeking to reach them or their proceeds in the hands of the executors, was held to be properly brought against the executors alone without joining the heirs of the deceased as defendants. The suit in effect sought to set aside the trust *pro tanto* between the executors and the heirs.¹ In like manner an action by one or more creditors against the debtor and his assignee in trust for all the creditors, to set aside the assignment on the ground of fraud, or for any other reason, is properly brought without joining all or any of the other creditors, who are the beneficiaries, either as defendants or as plaintiffs.²

§ 358. On the other hand, if an action is brought based upon the assignment or other deed as a valid transaction, seeking to enforce the trust, to obtain an accounting, to procure a final settlement, or for any other similar relief which recognizes and adopts the trust, and which, when obtained, would alike beneficially affect all the persons similarly situated, all the creditors or other *cestuis que trustent* must either unite as plaintiffs, or, if the suit is instituted by one or by some, the others must be joined as defendants. The court will not permit the same question to be litigated in separate suits at the instance of each person who has a demand identical in its nature with that held by all the others.³ An action by distributees against their administrator, or by any beneficiaries against their trustee, to open an account once settled, on the ground of an alleged fraud, and for a new

¹ Paul v. Fulton, 25 Mo. 156. See also Ridenour v. Wheritt, 30 Ind. 485.

² Bank of British North America v. Suydam, 6 How. Pr. 379. See also Mitchell v. Bank of St. Paul, 7 Minn. 252, which was an action by a stockholder to set aside proceedings of the officers, and particularly an assignment in trust for creditors; also, French v. Gifford, 30 Iowa, 148, 159.

³ Bank of British North America v. Suydam, 6 How. Pr. 379; Garner v. Wright, 24 How. Pr. 144; 28 id. 92. Generally, when a demand is payable out of a trust fund, the trustees and the beneficiaries must be joined as defendants in the action to recover it. Emmert v. De Long, 12

Kans. 67, 88. Except in the cases of administrators and executors, and of assignees, for the benefit of creditors, the general rule is that in all actions against trustees based upon the existence of the trust, the beneficiaries also must be made parties. Story's Eq. Pl., §§ 192, 193, 207; Helm v. Hardin, 2 B. Mon. 232; Clemons v. Elder, 9 Iowa, 272; Van Doren v. Robinson, 1 C. E. Green, 256. If, however, the *cestuis que trustent* are very numerous, the rule is sometimes relaxed, or a portion of them only are brought in as representatives for the whole number. Story's Eq. Pl., §§ 118, 150; Holland v. Baker, 3 Hare, 68; Harrison v. Stewardson, 2 Hare, 530.

accounting and distribution of the shares claimed to be due, is plainly controlled by the same rule. It is entirely analogous to the suit above mentioned by creditors to procure an accounting from their assignee; it adopts and seeks to carry out the trust. All the distributees or beneficiaries must therefore be made parties, if not as plaintiffs, then as defendants.¹

§ 359. In actions to reach property impressed with an implied trust, or to enforce a lien thereon, the person in whom the legal title is vested, and who is an implied trustee, is, of course, a necessary defendant. Some examples will illustrate this rule. A husband purchased land with his own funds, but procured the deed to be made to his wife; he afterwards employed a person to erect a dwelling-house upon the land, who obtained a mechanic's lien on the premises for the price of his labor and materials. An action to enforce the lien was held to be properly brought against the wife and the husband; the legal title was held by her in trust for her husband, and as this title was to be divested by the judgment which was based upon a demand against the *cestui que trust*, both were necessary parties.² Land was purchased by a husband, but by arrangement was conveyed to his wife, the sale and conveyance being procured, as was alleged, by the fraudulent representations of both. The grantor, alleging the fraud and the nonpayment of the price, brought an action against the husband and wife to establish his debt and to enforce a lien for the same upon the land. Pending the suit the wife died, and her heirs were substituted as defendants in her place. The Supreme Court of Iowa, conceding that the heirs were necessary parties, held that the wife's administrator was a proper and, under certain aspects of the case, a necessary defendant, and ordered him to be brought in. If the action was simply to recover a pecuniary de-

¹ *Dillon v. Bates*, 89 Mo. 292. This rule is general. Whenever an action is brought for an accounting and settlement of a trust estate, all persons interested in the estate must be parties. *Devaynes v. Robinson*, 24 Beav. 86; *Coppard v. Allen*, 2 DeG., J. & S. 173; *Hall v. Austin*, 2 Coll. 570; *Biggs v. Penn*, 4 Hare, 469; *Chancellor v. Morecraft*, 11 Beav. 262; *Penny v. Penny*, 9 Hare, 89. If several trustees have been guilty of a breach of trust, all must be joined in a suit by the *cestui que trust* brought to obtain relief

against such breach. *Walker v. Symonds*, 3 Swanst. 75; *Munch v. Cockerell*, 8 Sim. 219, 231; *Perry v. Knott*, 4 Beav. 179, 181; *Shipton v. Rawlins*, 4 Hare, 619. And in an action by one trustee against a co-trustee for a breach of the trust, all the beneficiaries who have concurred in such breach are necessary defendants. *Jesse v. Bennett*, 6 DeG., M. & G. 609; *Williams v. Allen*, 29 Beav. 292; *Roberts v. Tunstall*, 4 Hare, 257, 261.

² *Lindley v. Cross*, 81 Ind. 106.

mand from the defendant, he was clearly a necessary party; but if it was only to establish a specific lien, he was only a proper party.¹ A railroad company having placed certain of its bonds in the hands of a trustee upon trust to pay therefrom a debt due to a certain creditor of the company, and the trustee having, in violation of his duty, surrendered up the bonds to the company, and permitted them to be cancelled, whereby the security was utterly lost, it was held, in an action by the creditor against the trustee for a breach of his trust, that the railroad company was not a necessary defendant.² The owner of bonds and other securities deposited them with his agent for a specific purpose. The agent, in violation of his fiduciary capacity, disposed of them to divers persons at different times, and in different amounts. The owner brought an action against the agent and all the transferees for the purpose of setting aside the sales and reaching his property or its proceeds. It was held, that this common action was improperly brought; that there was no community of interest among the defendants; and that a separate suit should have been instituted against the agent and each assignee.³

§ 360. VI. *Actions against Corporations and Stockholders.* Actions to wind up the affairs of corporations, and those permitted by creditors against stockholders to enforce a personal liability of the latter, depend so entirely upon special statutory provisions, and these are so different in different States, that no general rule can be laid down concerning them which shall be a part of the common procedure. In fact, the subject does not strictly belong to a treatise upon the principles of the codes. I have collected some cases, however, which indicate the tendencies of the courts in the various States.

§ 361. An insurance company became insolvent, and a receiver was appointed to wind up its affairs. While it was in an insolvent condition, the directors had declared dividends which had

¹ Parshall v. Moody, 24 Iowa, 814.

² Ridenour v. Wherritt, 80 Ind. 485. This decision was, of course, made upon the objection of the trustee. He was clearly liable; and the legal doctrines as to joint liability could not apply in such a case. The court could not have held that the railroad company was not a proper party if the creditor had chosen to make it a defendant. It participated in the

wrong by accepting and cancelling the bonds with knowledge that the trust had not been fulfilled.

³ Lexington, &c. R. R. v. Goodman, 5 Abb. Pr. 498, per Peabody J. This decision, as it seems to me, is in direct conflict with the well-settled principle which has been stated in the text, and which is fully sustained by the authorities.

been paid to stockholders. Certain creditors brought separate actions against individual stockholders to recover back the dividends so paid and received, which actions were pending. In this condition of affairs the receiver instituted a suit against all the stockholders to compel a repayment of all the illegal dividends, and made the above-mentioned creditors defendants, asking against them an injunction to restrain the further prosecution of their actions. It was held by the New York Court of Appeals that the receiver could maintain such an action; that the creditors could not; that all the stockholders were properly sued together; and that the creditors were properly joined so as to restrain their proceedings and avoid a circuitry of action, and settle the whole in one controversy.¹ A stockholder, suing on behalf of all the others, instituted an action against a railroad company to compel the declaration of a dividend, alleging that funds were in its hands sufficient and appropriate for that purpose. The action was dismissed because, if sustainable at all, it should have been against the directors, who were the managing trustees, and whose duty it was to declare a dividend, if any such duty existed.²

§ 362. In a suit by judgment creditors of a corporation (on behalf of all others who should come in) against the stockholders, who were made liable by statute for the debts of the company in specified contingencies, certain other judgment creditors were united as defendants. Upon a general demurrer interposed by them, they were determined to be neither necessary nor proper defendants. They should have been joined as plaintiffs, if at all; but this was not necessary, and the complaint contained no allegation that they had refused to unite in that manner.³ In Ohio, under statutes making stockholders liable to judgment creditors when the ordinary legal remedies against the corporation have been exhausted, it has been held that all the stockholders must be united as defendants, and proceeded against in a single action.⁴

§ 363. An action by stockholders of a bank against the president and other officers, the corporation itself, and an assignee, alleging fraud and violation of duty by the officers, misapplication of funds terminating in a fraudulent assignment, and praying

¹ *Osgood v. Laytin*, 5 Abb. Pr. n. s. 1. *Steamship Co.*, 10 Abb. Pr. 229, per

² *Karnes v. Rochester, &c. R. R.*, 4 Hogeboom J.

Abb. Pr. n. s. 107, per T. A. Johnson J.

⁴ *Umsted v. Buskirk*, 17 Ohio St. 113.

³ *Young v. New York and Liverpool*

that the assignment might be set aside, the officers removed, a receiver appointed, and the bank wound up, was sustained in Minnesota as being within the jurisdiction of an equity court, and was declared to be brought against the proper parties.¹ In a similar action, based upon the same facts, and asking for a removal of the officers, the appointment of a receiver to take charge of the assets, and for an election under the direction of the court, the corporation was held to be a necessary party defendant as well as the officers implicated.²

§ 364. The holder of stock in a corporation assigned it to a creditor as collateral security for the debt, and this creditor in turn assigned or pledged the security to a third person. The latter having commenced an action to enforce his right of property against the corporation alone, it was decided, in Indiana, that both of the assignors were necessary defendants under the special provisions of the code of that State, which require the assignors of things in action not negotiable to be made parties in a suit by the assignee.³ But in New York, where the debtor, defendant in an action by an assignee of the demand, was entitled to an accounting with the assignor in respect of the claim sued upon, in order to ascertain in fact whether any such claim existed, and applied for an order bringing him in as a defendant for that purpose, it was held that such assignor was neither a necessary nor a proper party, and could not be brought in.⁴ The courts of New York seem to have established the rule under the code for that State, that an assignor of a thing in action is never a proper, much less a necessary defendant in an action by the assignee, even when the plaintiff's contention depends upon the legal relations and liabilities existing between the defendant — the debtor — and the assignor. This doctrine is entirely contrary to that which prevails in many of the States, and which is sanctioned by their codes and approved by their courts; and it seems to be equally opposed to the former doctrine of equity which permitted, if it did not require, the presence of the assignor in all cases

¹ *Mitchell v. Bank of St. Paul*, 7 Minn. 252.

² *French v. Gifford*, 30 Iowa, 148, 159.

³ *Ind. & Ill. Cent. R. R. v. McKernan*, 24 Ind. 62.

⁴ *Allen v. Smith*, 16 N. Y. 415. See also *Andrews v. Gillespie*, 47 N. Y. 487,

which holds that the mortgagee who assigned the mortgage is not a proper defendant in an action to foreclose, even though the defence pleaded by the mortgagor is that of mistake in drawing the mortgage, and prays the relief of reformation.

where the assignment did not convey a legal title, and especially where an accounting or other settlement of matters in dispute between the assignor and the defendant was necessary in order to ascertain the amount of the plaintiff's demand.¹

§ 365. In an action virtually of accounting by one partner against another to recover the plaintiff's share of the assets or profits, and, *a fortiori*, when the action is confessedly one for accounting, all the partners must be defendants.² This special rule assumes that there has been no settlement, no balance ascertained and agreed upon, so that a simple action at law could be maintained therefor by one partner against another, but the situation is such that an action for an accounting is the only relief given by the law. In such equitable action all the partners are necessary parties. A partnership being engaged in the business of buying and selling lands, for purposes of convenience had all the titles taken in the name of one member of the firm. He died, being at the time thus the apparent owner of lands which were actually firm property. An action by the survivor for an account and settlement was properly brought against the heirs, widow, and administrator of the deceased; these persons were all held to be necessary parties.³

§ 366. VII. *Actions for a Specific Performance.* It is the established rule of equity procedure that, in the ordinary and direct action to compel the specific performance of a contract for the sale of lands, the parties to the contract themselves, or the persons who have become substituted in their place, as the heirs and, under certain circumstances, the executors or administrators, are the only proper parties plaintiff or defendant. A suit for the purpose of obtaining this special relief cannot be combined with a cause of action for relief against other persons claiming an interest in the same land; in other words, this action cannot be made to determine the titles of other claimants, nor to foreclose the liens of subsequent incumbrancers.⁴ This well-settled rule

¹ Story's Eq. Pl., § 153, and notes; 1 Dan. Ch. Pl. (4th Am. ed.), pp. 197-199, and notes; Miller v. Bear, 8 Paige, 467, 468; Whitney v. McKinney, 7 Johns. Ch. 144; Trecothick v. Austin, 4 Mason, 41-44.

² Duck v. Abbott, 24 Ind. 349; Settembre v. Putnam, 30 Cal. 490.

³ Gray v. Palmer, 9 Cal. 616.

⁴ Tasker v. Small, 8 My. & Cr. 63, 68, per Lord Cottenham, Chan.; Mole v. Smith, Jacob, 490, 494, per Lord Eldon, Chan.; Wood v. White, 4 My. & Cr. 470; Robertson v. Great Western R. R. Co., 10 Sim. 314; Fagan v. Barnes, 14 Flor. 58, 57; Knott v. Stephens, 8 Oregon, 269.

has, however, been departed from by some State courts. Thus, in a case decided by the Supreme Court of Minnesota, a contract to convey land had been given, and the vendee had gone into possession. Subsequently to the execution of the agreement and the change of possession, certain persons had recovered judgments against the vendor, which they claimed to be liens upon the land. These judgment creditors were held to be proper defendants in the suit for a specific performance brought by the vendee for the purpose of cutting off their rights of redemption, it being assumed that their liens were subordinate to the vendee's rights.¹ And it was held by a recent case in California that, in an action to compel the specific performance of such a contract, — the land being an undivided share of a specific tract, — all persons subject to the vendee's equities, and holding adversely to him, must be made defendants.²

§ 367. In a somewhat peculiar case recently decided by the Supreme Court of New York, a person holding a subsequent and adverse claim to the plaintiff was declared to be a necessary defendant to a complete determination of the issues. The action being brought to procure the specific performance of a land contract made between the plaintiff and the defendant, the complaint alleged that the defendant had made a subsequent contract to convey the same land to F., and prayed an injunction restraining defendant from making a conveyance to F. Upon this allegation and prayer for relief, it was held that such subsequent vendee was a necessary party.³ Where the vendor has died, and the

In *Tasker v. Small*, mortgagees of the land were held to be improper defendants. In another case, a tenant of the vendor in possession was declared an improper party. All persons interested in the subject-matter of the action as holders of the legal or equitable titles to the premises in question were declared to be necessary parties, plaintiff or defendant, in *McCotter v. Lawrence*, 6 N. Y. Sup. Ct. 892, 895.

¹ *Seager v. Burns*, 4 Minn. 141, 145, per Emmett J. The judge made no suggestion of a doubt whether these creditors were proper parties. The whole discussion turned upon the question whether the general allegation of the plaintiff, that they "claimed an interest," &c., was enough. They were likened by the court

to junior incumbrancers in a mortgage foreclosure. None of the authorities last cited were mentioned.

² *Agard v. Valencia*, 89 Cal. 292. This case is somewhat peculiar, and the facts are exceedingly complicated. The decision certainly seems to conflict with the general rule as established by equity courts, and as stated in the text.

³ *Fullerton v. McCurdy*, 4 Lans. 132. When A. agrees to convey to B., and afterwards conveys to C., who has notice of the prior contract, C. is a necessary defendant in an action by the original vendee to compel a specific performance. *Stone v. Buckner*, 12 Smedes & M. 73; *Daily v. Litchfield*, 10 Mich. 29; *Spence v. Hogg*, 1 Coll. 225.

vendee brought his action against the sole heir at law of the deceased, but conceded in his complaint that the entire purchase-money had not been paid, and averred a tender and a readiness to pay, the administrators of the vendor were held to be necessary defendants in New York.¹ It would appear from the reasoning of this case that its decision is confined to the single case in which the vendor has died before the purchase-money has been entirely paid, and in which the same remains unpaid up to the time of commencing the action. If the purchase price has been paid in full, either to the vendor during his lifetime, or to his administrators after his death, then his heirs would seem to be, in general, the only necessary parties defendant, his personal representatives not then having any interest in the controversy.² In the face of a statute providing that an action for a specific performance of a land contract may be brought against the executor or administrator of a deceased vendor, and that other parties are not necessary but may at the discretion of the court be brought in, the Supreme Court of Iowa has held that such personal representatives are not necessary but only proper parties; that in the absence of the statute the heirs of the vendor are the only proper or possible parties; and that the language of the statute being permissive, it will not be construed to make the administrators or executors necessary defendants.³

¹ *Potter v. Ellice*, 48 N. Y. 821, 823. Hunt C. J. said: "It is difficult to say that this action is well brought, the administrators of Ellice [the vendor] not being made parties defendant. The heir of Mr. E. holds the legal title in trust to convey the same to the vendee upon performance of the conditions of the contract. He is a mere instrument, having no real interest in the matter in a case where the contract is performed. The administrators are the real parties in interest. Both by the statute and the common law the interest in the contract passes to them. They are the parties to whom the money is to be paid, and who have the entire beneficial interest in the contract. Their discharge or receipt is a necessary muniment to the vendee. They are the parties who not only receive, but who are to settle, or contest, as the case may be, the amount to be paid by the vendee in fulfillment of his contract."

² All the heirs of a deceased vendor are necessary defendants in the action. *House v. Dexter*, 9 Mich. 246; *Duncan v. Wickliffe*, 4 Scam. 452.

³ *Judd v. Mosely*, 30 Iowa, 428, 427. The action was by the vendee against the heirs only of the deceased vendor. The defendants demurred, relying upon the statute, and claiming that the administrators should have been the defendants, and not the heirs. The court made no allusion to the question discussed in *Potter v. Ellice*, — the payment of the purchase price; nor does the report show whether the price had been paid or not. When a vendee dies, and the vendor sues for a specific performance, the personal representatives are the primary defendants, since they pay the purchase price; but the heirs are also necessary defendants, since the conveyance by the vendor will be made to them; but if the vendee has devised all his interest under the contract, the devisees

§ 368. In an action against the vendor to compel the specific performance of his contract, the plaintiff united with him as codefendants the holders of two prior mortgages embracing the land agreed to be conveyed which had been given by the vendor, alleging in his complaint that the vendor had agreed to pay off and remove these mortgages, and that they included other lands in addition to that claimed by the plaintiff which were sufficient to satisfy the demand secured thereby, and praying that the mortgagees might be compelled to sell such other lands first. The New York Court of Appeals, however, held that these mortgagees could not be joined as codefendants in the action.¹ When in the contract for the sale and conveyance of land the vendor appointed a certain person as his agent to make and deliver a deed in his name to the vendee, and directed the agent to execute and deliver the same, and neither the vendor nor the agent complied with the terms of the agreement, an action brought against the vendor and the agent as codefendants was held to be improper, and the agent was declared not to be a proper party in any aspect of the case, since he had no interest in the controversy adverse to the plaintiff.² Land had been sold at execution sale, and afterwards redeemed in alleged compliance with the statute which prescribes the manner of redemption. The purchaser denying the validity of the redemption, brought an action against the sheriff alone to compel an execution and delivery of the deed, and this action was held insufficient; it should have embraced the person who made the redemption, and who claimed to hold the land by virtue thereof, as a codefendant with the sheriff.³

are the necessary codefendants with the personal representatives. Story's Eq. Pl., §§ 160, 177; *Champion v. Brown*, 6 Johns. Ch. 402; *Townsend v. Champenowne*, 9 Price, 180. If the vendor sues the heirs alone of the deceased vendee, the latter can insist upon the administrators being brought in. Story's Eq. Pl., § 177; *Cock v. Evans*, 9 Yerg. 287. The vendor and the vendee having both died, the heirs and widow of the latter brought a suit against the devisees of the vendor to whom the land had been devised, and the parties were all held to be proper in *Peters v. Jones*, 85 Iowa, 512, 518. See cases cited by Miller J. at page 518.

¹ *Chapman v. West*, 17 N. Y. 125. It will be seen that here was an attempt to

unite two entirely distinct causes of action,—one for a specific performance against the vendor, and the other for the marshalling of the securities against the mortgagees. These causes of action were completely independent of each other. If the plaintiff was entitled to the relief he demanded against the mortgagees, he could obtain it as well in a second action after the conveyance to him; and if the vendor had agreed to pay off these incumbrances, their amount could be allowed to the plaintiff in reduction of the purchase price, although the holders of the liens were not parties to the action for a specific performance.

² *Dahoney v. Hall*, 20 Ind. 264.

³ *Crosby v. Davis*, 9 Iowa, 98. Where

§ 369. VIII. *Actions to quiet Title.* The nature of the action to quiet title is such that it is impossible to lay down any but the most general rule in relation to its parties defendant. The very object of the proceeding assumes that there are other claimants adverse to the plaintiff, setting up titles and interests in the land or other subject-matter hostile to his. Of course all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants. Originally, and independent of statute, this particular jurisdiction of equity was only invoked when either many persons asserted titles adverse to that of the plaintiff, or when one person repeatedly asserted his single title by a succession of legal actions all of which had failed, and in either case the object of the suit was to settle the whole controversy in one proceeding. The action has, however, been greatly extended by statute, especially in the Western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession claiming an estate in the lands. The adverse claimant or claimants must be out of possession, and must assert a hostile title or interest. In this condition the possessor of the land, without waiting for any proceeding legal or equitable to be instituted *against* him, may take the initiative, and by commencing an equitable action may compel his adversaries to come into court, assert their titles, and have the controversy put to rest in the single judgment. It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment. The action to quiet title is not, however, confined to the ownership of lands; its use is multiform; it may be invoked to determine conflicting rights over personal property, and even rights growing out of contract where a multiplicity of actions depending upon the same questions will thereby be avoided. I shall now give some illustrations of the action and of its different forms. It

the vendee subcontracts, there is a distinction depending upon the nature of the subcontract. If A. agrees to convey to B., and the latter in turn agrees with C. that the conveyance shall be made by A. directly to him, — C., — then C. must be joined with B. in the action, primarily as a plaintiff, but if not, then as a defendant;

but if the agreement between B. and C. is that B. will convey the land to C., then B. is the only necessary party in the action against A. *Alexander v. Cans*, 1 DeG. & Sm. 416; *Chadwick v. Maden*, 9 Hare, 188; *B— v. Walford*, 4 Russ. 372.

will be seen that each case must stand mainly upon its own circumstances under the guidance of the general principle which requires all persons whose rights and interests could be affected by the decree to be made parties.

§ 370. The officers of a railroad company, in violation of their duty and of the charter, and with a fraudulent intent, issued large amounts of spurious stock of the corporation, which had all the appearance on the face of being genuine. These issues had been made at different times, and to various persons, and the stock was actually held by three hundred and twenty-six separate owners who had bought it in the course of business supposing it to be genuine. Most of these holders had commenced suits against the company to compel it to recognize the stock as valid in their hands. Under these circumstances the corporation began an action against all these three hundred and twenty-six persons as defendants, to procure the stock to be declared spurious, to enjoin the suits then pending, and to determine the controversy at one blow. The suit was sustained as a bill of peace and to quiet title, and the defendants were held to have been properly united in the one proceeding; their stock was tainted (if at all) by a common vice, and the same fundamental question disposed of all their claims.¹ On the same principle, the receiver of an insolvent insurance company was permitted to unite all the judgment creditors of the corporation who were separately suing the stockholders on their personal liability, and to enjoin their actions in order that the liability of all the stockholders might be enforced by himself in the same action.²

§ 371. In an action to quiet title to lands by correcting mistakes in deeds thereof, all persons having any interest in the land, or having any interests which could be affected by the relief demanded, must be brought before the court as defendants. When

¹ *N. Y. & N. H. R. R. v. Schuyler*, 17 N. Y. 592. The final result was, that the court pronounced the stock valid as against the company, and each defendant obtained a separate judgment against the plaintiff. S. C. 84 N. Y. 30. Bills of peace are sometimes permitted to be brought against a part only of those claiming adversely to the plaintiff when their number is very large; but in all such cases the right must be general

among all these claimants. *Story's Eq. Pl.*, §§ 120, 130 *et seq.*; *City of London v. Perkins*, 4 Bro. P. C. 168; *Hardcastle v. Smithson*, 8 Atk. 245; *Adair v. New River Co.*, 11 Ves. 429; *Newton v. Earl of Egmont*, 5 Sim. 130; *Harrison v. Stewardson*, 2 Hare, 530; *Holland v. Baker*, 8 Hare, 68.

² *Osgood v. Laytin*, 5 Abb. Pr. x. s. 1 (Ct. of App.).

the land has passed through several owners by a succession of conveyances, all the series of grantors, or their heirs if they themselves are dead, are necessary defendants.¹ In another case involving the same principle, a sale had been made under a power of sale contained in a mortgage of land, and a deed of the land executed by or on behalf of the mortgagee to the purchaser. In the description of the premises contained in this mortgage there was an important mistake, which was repeated in the deed to the purchaser who took the conveyance in ignorance thereof. On discovery of this error he brought an action to reform the mortgage and his deed by correcting the mistake, and made the mortgagor the only defendant. The Supreme Court of Missouri held upon these facts the mortgagee was a necessary defendant, and must be brought in before any judgment could be rendered.²

§ 372. The general rule governing actions to quiet and determine title to lands brought by the one in possession against the persons who set up adverse claims, was clearly and accurately stated by the New York Court of Appeals in a recent case. The proceeding was instituted under a statute which corresponds in its important features with the description of that class of enactments given in a preceding paragraph (§ 369). The party in possession had united all the adverse claimants as defendants in his suit, and this was objected to as a misjoinder. The court stated the doctrine in the following manner: "It is claimed on the part of the respondents that the plaintiff could not unite all the claimants as defendants in the action. I cannot doubt that this claim is entirely unfounded. Here are twenty-four persons claiming title to this real estate. They all denied the plaintiff's right upon the same ground, and claimed title from the same source, and therefore had the same defence to the action. It cannot be that under the Revised Statutes it would have been necessary for the plaintiff to have instituted in such a case twenty-four special proceedings. Under the Revised Statutes these

¹ *Flanders v. McClanahan*, 24 Iowa, 486. See this case for a very elaborate discussion of the doctrine stated in the text; but see *Thomas v. Kennedy*, 24 Iowa, 397; and see *Beckwith v. Darges*, 18 Iowa, 303. In an action to reform a deed, both the grantor and the grantee are necessary parties. *Pierce v. Faunce*, 47 Me. 507. As to necessary or proper

defendants in actions to correct mistakes in instruments, see *Newman v. Home Ins. Co.*, 20 Minn. 422, 424; *Durham v. Bischoff*, 47 Ind. 211.

² *Haley v. Bagley*, 37 Mo. 863. The court finally held that the purchaser could not maintain such an action at all; that he was not in such privity with the mortgagor as to entitle him to the relief.

defendants, if they had all been in possession of this real estate, claiming the same title which they set up as defendants in this action, could all have been united as defendants in an action of ejectment; and they could, if they had chosen to do so, all have united in an action of ejectment against the plaintiff. Hence there was no error in the joinder of these defendants.”¹

§ 373. IX. *Actions for Partition.* The action of partition has been made the object of so many special and varying statutory regulations in the different States, that it cannot properly be said to fall within the domain of the general procedure as the same is established by the codes. I shall only attempt, therefore, to point out its general features relating to parties defendant, and such as are common to all or several of the States in which the reformed system prevails. The primary object of the action is to divide the land according to their respective interests among the co-owners. The proceeding may be instituted by any co-owner, and all the other co-owners are of course necessary defendants, and they are in such case the only necessary, or even proper defendants, for the rights of no other classes of persons could be affected by the decree making the division. General creditors of any co-owner, or of any prior owner of the whole tract of land, — as, for example, the deceased ancestor of the present co-owners, — or of any prior owner of part of the land, not having obtained judgment, and not therefore holding any lien upon the premises or a part of them, would not be proper defendants for any purpose, any more than the general creditors of a mortgagor in the case of

¹ *Fisher v. Hepburn*, 48 N. Y. 41, 55, per Earl J. In a similar action, brought by the plaintiff to quiet his title and to cut off the adverse claim of the defendant, the latter answered that before the commencement of the action he had conveyed away all his interest in the premises by a warranty deed to one C., and he disclaimed all further interest therein. This fact appearing on the trial, C. was held to be a necessary defendant, and the action was held over by the court in order that he might be brought in by the plaintiff; but, the plaintiff neglecting to bring him in, the action was dismissed. *Johnson v. Robinson*, 20 Minn. 170. Actions to determine title sometimes arise when the land has been “settled,” — that is, conveyed to persons having present partial

estates, and to others having future estates either vested or contingent, by way of remainder, executory devise, or use, although such cases are, of course, much more common in England than in this country. In all such actions affecting the inheritance, and in all actions affecting the inheritance where the land is held in the manner described, the rule is well settled that the holders of all the intermediate estates down to and including the holder of the first vested estate of inheritance must be joined as defendants. *Story's Eq. Pl.*, §§ 144, 198; *Sutton v. Stone*, 2 Atk. 101; *Reynoldson v. Perkins*, Amb. 564. This rule has been adopted in New York, and applied to partition suits. *Mead v. Mitchell*, 17 N. Y. 210, 214, 215; *Clemens v. Clemens*, 87 N. Y. 59.

a foreclosure. The holders of liens upon the entire tract to be divided, such as judgment creditors of the former owner, or the holders of mortgages given by a former owner, would not be necessary defendants, nor would they be even proper parties to the action. Their liens would be utterly unaffected by the decree and subsequent division in pursuance thereof. As their judgments or mortgages were incumbrances upon the whole land prior to the titles of the present co-owners, the division of the real estate among these co-owners would leave the same liens undisturbed and effectual upon the same premises in their full force and effect. The transaction would be the same in substance as the conveyance by a mortgagor of the mortgaged premises to a grantee who takes them subject to the existing lien. Such incumbrancers are therefore, according to the doctrines of equity, not even proper parties defendant, when the action is simply for a division of the soil.

§ 374. The case of those who hold liens upon the undivided shares of individual co-owners, may appear at first view to be somewhat different from the one last described, but it really falls within the same principle. As long as the co-owner's share remains undivided, the incumbrance upon it is equally vague; that is, it is not a lien upon any specific and determined part of the whole common tract, but upon an undivided and undistinguished fraction of it. As the single co-owner himself cannot say of any particular spot of the territory in question, "*This* is mine, I am entitled to the exclusive possession of this," so his judgment creditor or mortgagee cannot say of any particular lot, "I have a lien upon *this*, and can enforce that lien by selling this specific portion." The sole effect of the decree and the decision in execution thereof is to allot a certain specified and determined piece of land to the co-owner in place of his former undefined share, and to transfer the lien-holder's incumbrance to this specified and determined portion of the soil. The incumbrance itself is neither increased nor diminished in amount; it is merely changed from its floating to a fixed character. It is plain, therefore, that the incumbrancer thus described has no real legal or equitable interest in the partition suit when the same is instituted and carried on to its end for the mere purpose of dividing the land among the co-owners. His rights are unaffected; his lien undisturbed. The only apparent interest which he has, or can

possibly have, is not in the action itself, nor even in the judgment ordering a partition, but in the execution of that judgment. It may be said that he has an interest to see that the division is properly made, so that the co-owner on whose share he has the lien will receive a fair allotment, and that thus the value of his own security will be preserved. He has such an interest undoubtedly, but it is not a *legal* one; nor does it commence until the cause is decided and the judgment rendered. Moreover, the actual division is made by officers of the court, — the sheriff, or commissioners appointed in the case, — and they act under the direction and control of the court itself. As in the case of all other administrative official acts the law presumes that they will be rightly done, it does not require a person to be made a party to the action in order that he may be in a position to protect himself against the wrongful acts of the officers who are appointed to carry a judgment of the court into effect. Persons are made parties in order that they may have an opportunity of presenting their rights and claims to the judge before he makes his decree, to the end that they may be considered and passed upon and established by the judgment itself. When that judgment can in no possible manner affect his rights, he is not even a proper party to the suit. I have thus stated the principles of equity unmodified by statute which govern the action of partition when the same is brought for an actual division of the land. The statutory provisions in relation to the action may have altered these rules in some particulars; but I have only designed to present the equity doctrine pure and simple with the reasons therefor; so that local changes, wherever they have been made, will be the more readily understood and their effect appreciated.¹

¹ Prior to any contrary statute, the rule was well settled that incumbrancers on the undivided shares, or on the whole tract, are not proper parties. *Harwood v. Kirby*, 1 Paige, 469, 471; *Sebring v. Mersereau*, *Hopk.* 601, 608; *s. c.* on app. 9 *Cow.* 344, 345; *Wotten v. Copeland*, 7 *Johns. Ch.* 140, 141; *Agar v. Fairfax*, 17 *Ves.* 542, 544; *Baring v. Nash*, 1 *Ves. & B.* 551. All the tenants in common, or owners of undivided shares, must be parties either plaintiffs or defendants. *Burhans v. Burhans*, 2 *Barb. Ch.* 398; *Teal v. Woodworth*, 3 *Paige*, 470. When

a tenant in common has assigned his share for the benefit of his creditors, such creditors are not proper parties. *Van Arsdale v. Drake*, 2 *Barb.* 599. A widow entitled to dower in an undivided share is a necessary party. *Wilkinson v. Parish*, 3 *Paige*, 653; *Green v. Putnam*, 1 *Barb.* 500; *Gregory v. Gregory*, 69 *N. C.* 522, 526. But a widow who is entitled to dower in the whole tract is not a necessary defendant unless a sale of the land is to be made. *Tanner v. Niles*, 1 *Barb.* 560. It is held in New York that, independent of statute, subsequent contingent

§ 375. There is another aspect, however, of the partition suit which places it in very different relations to the holders of liens and incumbrancers either upon the whole land paramount to the titles of the co-owners, or upon the undivided shares of the co-owners themselves. Its object is sometimes to sell the whole land, and to divide the proceeds, and not to divide the land itself. When this is the nature of the judgment, it is plain that the rights and interests of the lien-holders must be adjusted and determined in the one action, and especially so when the land is to be sold free from all incumbrance, so that the lien of all the mortgages and judgments will be transferred from the real estate to the fund which is the proceeds thereof, and they will be paid off and satisfied therefrom. There is then a necessary antagonism between the co-owners and all classes and species of incumbrancers upon their undivided shares. Their rights are clashing; they are opposing claimants of the same fund; the interests of all are to be finally established and satisfied at the one judicial proceeding. It is evident, therefore, upon the most familiar principles of equity jurisprudence in its relation to parties, that in the aspect of the action now described, all the holders of liens and incumbrances upon the undivided shares of individual co-owners created subsequent to the inception of their titles, are not only proper but necessary defendants in order that a decree should be made determining all these conflicting rights and claims, while the holders of prior liens, if not necessary, are at least proper parties for a complete adjudication.¹ It may

remainder-men, or persons holding under executory devises who may hereafter come into being, are bound by a decree in partition made by a court of equity, when the present owners of a vested estate of inheritance in the land have been made parties. *Mead v. Mitchell*, 17 N. Y. 210, 214, 215; *Clemens v. Clemens*, 87 N. Y. 69.

¹ Most of the States have legislated in reference to partition, and have modified the original equity doctrine of parties, especially in relation to incumbrancers, by either permitting or requiring the holders of liens to be joined as defendants in the action. I add an abstract of the provisions which are generally adopted. N. Y., 2 Edm. St. at Large, p. 826 *et seq.* § 1. All tenants in common, &c., and persons

entitled to dower, if not admeasured, must be parties. The same provision substantially is found in all the statutes; § 8. Lien-holders need not be made parties in the first instance; § 10 *a*; but every incumbrancer of an undivided share may be made a defendant; § 42. Before an order for the sale of the land, all incumbrancers of undivided shares, if not already parties, must be brought in by amendment. Provision is made for concluding unknown and contingent interests and owners. The same rules are enacted in the following States: California, Code of Civ. Proc., §§ 752-754, 759, 761; Wisconsin, 2 R. S., ch. 142, §§ 1, 4, 5, 7, 9, 17, 38; Oregon, Civil Code, ch. 5, tit. 5, §§ 419, 421, 438, but incumbrancers by judgment are excepted, and are not to be

sometimes be impossible at the commencement of the action to determine whether the judgment will be given for a simple partition of the land itself, or for a sale of the land and a division of the proceeds after satisfying the incumbrances, and therefore the classes of persons described may be joined as defendants from motives of precaution. The results thus reached from an analysis of the action itself with its peculiar relief, and the application thereto of familiar equity doctrines, have, however, been largely modified in many States by statutory regulations.

§ 376. In New York, when the action for a partition is brought by one tenant in common in fee, his wife is a necessary party, but rather as a defendant than as a plaintiff. Her inchoate right of dower is entitled to protection.¹ If one tenant in common dies, so that his estate descends to his heirs, if other of the co-owners were indebted to him for rents and profits of the land, his administrator should be joined as a party defendant with his heirs, since the sum due for these rents and profits, and which would be ascertained by an accounting and determined by the decree, would go to his personal estate in the hands of the administrator and not to his heirs.²

§ 377. In Indiana, the widow takes an undivided portion of the husband's land in fee, as his statutory heir. In an action of partition, brought by the widow against the other heirs of her deceased husband in that State, his creditors, it is held, cannot

made parties; Minnesota, 2 Stat. at Large, 1873, ch. 43, tit. 2, §§ 34-36, 42, lien-holders should be joined as defendants in the first instance; Nebraska, Code of Civ. Proc., §§ 802, 804, 819, 823, 842, 843; Kansas, Code of Proc., §§ 614-616; Iowa, Code, 1873, §§ 3278, 3280, 3281, 3284, 3287, holders of liens on the entire tract may be brought in. In Missouri, 2 Wagner's Stat., ch. 104, §§ 1, 4, 6; Ohio, 1 R. S. ch. 81, §§ 1, 2, 12; Indiana, 2 R. S., ch. 11, §§ 1, 2, 6; and Florida, Bush's Digest, ch. 128, § 2, no mention is made of incumbrancers. It is held, however, in Indiana, that all persons interested should be made parties, and that lien-holders on undivided shares may be joined. Milligan v. Poole, 35 Ind. 64, 68. In Missouri, all the co-owners, including infants by their curator, may unite in the proceeding as plaintiffs, so that it will be entirely ex

parte. Larned v. Reushaw, 37 Mo. 458; Waugh v. Blumenthal, 28 Mo. 462. Where a deed of trust covered a portion of the land, the trustee and *cestui que trust* were held to have been properly made defendants in order to bind their interest, although no relief was asked against them. Reinhardt v. Wendeck, 40 Mo. 577. Such a deed of trust is equivalent to a mortgage, so that these defendants were, in fact, incumbrancers. As to the parties in Ohio, see Tabler v. Wiseman, 2 Ohio St. 207; Williams v. Van Tuyl, 2 Ohio St. 386. In New York, it is said that all incumbrancers should be brought in as parties in order that the land may be sold free. Bogardus v. Parker, 7 How. Pr. 305.

¹ Rosekrans v. White, 7 Lana. 486.

² Scott v. Guernsey, 60 Barb. 163, 181; s. c. on app. 48 N. Y. 106.

be made defendants for any purpose.¹ Under the California homestead laws, the wife is a necessary codefendant with her husband in the partition of lands which they claim or she claims to be a homestead.² The general rule is laid down in that State that "all persons having or claiming any interest in the land are not only proper but necessary parties to a suit for partition."³

§ 378. X. *Actions for various Miscellaneous Objects. Partnership Matters and Accounting.* An action by one partner against another for a dissolution and a winding up of the concern, partly based on the ground of a fraudulent transfer of firm property by the defendant partner to a third person, may properly include this assignee as a codefendant, since the sale may be declared void, and he may be ordered to account.⁴ When two of three partners—or any part of the entire firm—entered into a contract with a third person by which they transferred or agreed to transfer to him a certain share of *their* interest in the concern—a mine—and a like share of the profits made by their interest, an action by such assignee to determine his rights, and to obtain his share in the profits, would be properly brought against the two contracting partners alone; the other members would not be necessary defendants. But if the action is to wind up the concern, to dissolve the firm, and to sever the interests of the respective members, all the partners are indispensable parties; if the action is instituted by one, or by his assignee, all the others must be joined as defendants.⁵ And, as a general proposition, in an action to compel an accounting growing out of any transactions or relations, all persons interested in obtaining the account, or in the result thereof, are necessary parties, and should be made defendants, if not plaintiffs.⁶

¹ Gregory v. High, 29 Ind. 527. The court said: "Any decree of partition between the widow and heirs could not conclude the rights of the creditors against the estate of the deceased; nor could creditors prove their claims in such a proceeding to which the administrator was not a party."

² De Uprey v. De Uprey, 27 Cal. 329.

³ Ibid. p. 382, per Sanderson J. See Gates v. Salmon, 35 Cal. 576.

⁴ Webb v. Helion, 3 Robt. 625; Wade v. Rusher, 4 Bosw. 537.

⁵ Settembre v. Putnam, 80 Cal. 490.

See Blood v. Fairbanks, 48 Cal. 171, 174, 175.

⁶ Petrie v. Petrie, 7 Lans. 90, 95. The general doctrine is, that all persons interested in resisting the plaintiff's demands must be made defendants. As an example, all joint debtors, and all persons liable to contribute towards satisfying the plaintiff's claim, should be joined. Story's Eq. Pl., § 169; Madox v. Jackson, 3 Atk. 406; Bland v. Winter, 1 S. & S. 246; Jackson v. Rawlins, 2 Vern. 195; Ferrer v. Barrett, 4 Jones Eq. 455; Hart v. Coffee, 4 Jones Eq. 321. When a debt is

§ 379. *Rescission and Cancellation.* In actions to obtain this remedy, each case must to a great extent stand upon its own circumstances. There is one general principle which is generally applicable, and which regulates the selection of parties in all causes of this nature, whatever be the particular facts upon which each depends. It is the simple but comprehensive rule that all persons whose rights, interests, or relations with or through the subject-matter of the suit, would be affected by the cancellation or rescission, should be brought before the court as defendants, so that they can be heard in their own behalf. This general principle is assumed or expressly announced by all the decided cases, and those which are quoted are intended simply as illustrations.¹

§ 380. In an action to set aside an award, even for the misconduct of the arbitrators, the arbitrators themselves cannot properly be made defendants, as they have no interest in the subject-matter, nor are they legally affected by the relief if granted.² For the same reason a sheriff is neither a necessary nor a proper defendant in an action to set aside a deed of land given by him upon a sale under an execution against the plaintiff.³ The owner of land who had been induced to sell by the fraud and collusion of his own agent, and of the purchaser, conveyed the entire tract to such purchaser who took the apparent ownership in fee of the whole; but in fact, by a secret arrangement between himself and the vendor's agent, the latter was entitled to one half of the land so sold and conveyed, and actu-

joint, all the joint debtors must be made defendants; as, for example, if the suit is to enforce a demand against a firm, all the partners must be joined; and if the action is brought against the personal representatives of a deceased partner, the survivors must also be codefendants. Story's Eq. Pl., §§ 166-188; Pierson v. Robinson, 8 Swanst. 189 (n.); Scholefield v. Heafeld, 7 Sim. 667; Hills v. McRae, 9 Hare, 297; Butts v. Genung, 5 Paige, 254.

¹ In *Morse v. Morse*, 42 Ind. 365, an action was brought to revoke the probate and set aside a will on account of the birth of a posthumous child. Under a statute of Indiana, a suit to contest a will, or to set it aside, may be brought by one person, although others are interested in

the same manner who are not joined. None should be defendants but the executors, and the legatees and devisees named in the will, or the representatives of any that have died. The posthumous child was not a proper defendant nor a necessary plaintiff. Where a wife seized in fee of land died intestate, and her husband, tenant by the curtesy, conveyed the land by an absolute deed, in an action by the heir against the grantee to set aside this deed as a cloud upon his title, it was held that the husband was not a necessary defendant. *Zimmerman v. Schoenfeldt*, 6 N. Y. Sup. Ct. 142.

² *Knowlton v. Mickles*, 29 Barb. 465.

³ *Draper v. Van Horn*, 15 Ind. 155.

ally advanced to that end one half of the purchase price. An action by the grantor to set aside this conveyance was held to be properly brought against the ostensible purchaser of the whole who took the deed in his own name and the agent jointly, because the latter was in reality one of the purchasers, and his equitable interest would be affected by the decree of cancellation.¹

§ 381. In an action against a trustee to cancel a mortgage given to him as such, or to set aside a deed to him absolute on the face, which it was alleged was in fact a mortgage, all the persons interested in the mortgage debt and the security thereof, and particularly the beneficiaries for whose benefit the trustee held the security, are necessary parties defendant, and their absence would be fatal to the recovery of the relief demanded.² When the lands of a deceased testator or intestate have been sold in pursuance of an order of the surrogate, on the application of the administrator or executor, for the alleged purpose of paying the debts of the deceased, an action to set aside such sale must be brought not only against the persons to whom the land was sold, and the present owners thereof, but also against the personal representatives of the deceased, so that the question whether there were debts of such a nature and extent as to render the sale necessary, may be determined.³ Bonds having been issued in the name of a town in aid of a railroad under color of legal authority, and the town subsequently bringing an action to set aside the entire proceedings on the ground of illegality, and to procure the bonds to be delivered up and cancelled, all the holders of such bonds, it was held, could be united as defendants therein, so that their rights could be determined in one proceeding; it was not considered requisite to such joinder that any common interest in respect to their ownership of the securities should exist among the defendants; it was enough that their rights as holders all depended upon the one question involved in the suit.⁴ If a judgment has been recovered against two or more jointly, and one of them afterwards institutes an

¹ *Roy v. Haviland*, 12 Ind. 364.

² *Clemons v. Elder*, 9 Iowa, 272, 275.

³ *Silsbee v. Smith*, 60 Barb. 372. In such an action all persons who participated in the fraudulent transaction, and who claim a present interest in the prop-

erty affected by it, should be made defendants. *Howse v. Moody*, 14 Fla. 59, 63, 64.

⁴ *Town of Venice v. Breed*, 65 Barb. 597.

action to set aside such judgment or to restrain its enforcement on the ground of want of jurisdiction in the court which rendered it, or on the ground of fraud, his co-judgment-debtors must be made parties to the proceeding, either as plaintiffs, or, upon their refusal to join, as defendants; their presence before the court is necessary to any adjudication upon the merits.¹

§ 382. *Enforcement of Liens.* In an action by a subcontractor or material-man to enforce the mechanic's lien given by statute, it is proper to make the contractor a party defendant as well as the owner of the building, so that all the claims may be adjusted in one suit.² It is decided, in California, that when the building or other premises upon which the labor was performed is owned by a partnership, all the members of the firm are necessary defendants in an action to enforce a mechanic's lien, even though the plaintiff was employed by one of the partners alone, was ignorant of the other co-owners, and had filed his notice of lien only against the one employing him.³ It may be stated as a general rule that in all actions to enforce a lien, the person in whose adverse possession the property subject thereto is held, is a necessary defendant, or otherwise the decree would virtually be a nullity.⁴

§ 383. A contract for the sale of lands being pledged or assigned by the vendee as collateral security for the payment of a debt, and the creditor — the pledgee, or assignee — bringing an action to foreclose the right of redemption, and to sell the security, and to apply the proceeds in payment of his own demand, the vendor in the contract is held not to be a necessary party

¹ Gates v. Lane, 44 Cal. 392.

² Carney v. La Crosse, &c. R. R., 15 Wisc. 508; Lewis v. Williams, 8 Minn. 151. But it is held in Missouri that the sub-contractor need not bring in all of several joint contractors; the statute requiring the "original contractor" to be made a defendant is satisfied if one of them is joined. Putnam v. Ross, 55 Mo. 116; Horstkotte v. Menier, 50 Mo. 158, does not conflict with this decision, since it merely holds that the original contractor must be a defendant.

³ McDonald v. Backus, 45 Cal. 262.

⁴ Wingard v. Banning, 39 Cal. 548. A junior incumbrancer should be made a defendant, or his right of redemption will

not be cut off. Evans v. Tripp, 35 Iowa, 371. When the original owner of the premises on which the lien exists has conveyed all his interest by deed, he is no longer a necessary defendant if no personal judgment is asked; the suit must be against the grantee. McCormick v. Lawton, 8 Neb. 439, 451. In an action by the vendor in a land contract against the vendee to foreclose the latter's rights, and to sell his interest in the land for the balance of the purchase-price unpaid, the vendee's wife must be made a codefendant, in North Carolina, in order to cut off her inchoate dower right. Bunting v. Foy, 66 N. C. 193.

defendant in such suit.¹ The same rule must apply to all kinds and forms of securities and things in action which are pledged or assigned for the purpose of collateral security, such as bonds, notes, certificates of stock, and the like. The obligor on the bond, the maker of the note, the corporation which issued the stock certificate, cannot be a necessary defendant in an action to foreclose and sell.

§ 384. A mortgage was foreclosed in a summary manner prescribed by statute in Iowa, and the premises were conveyed to A., the mortgagee. He afterwards assigned the mortgage and the note secured by it to B., and entered into a written agreement to convey to him the land. B. subsequently brought an action to foreclose the same mortgage against the mortgagor and the subsequent incumbrancers, and also made A. a defendant, setting up the former summary proceedings and A.'s agreement to convey, averring that such proceedings were invalid and worked no change in the rights of the parties, and also alleging that there was a mistake in the description of the land contained in the contract made by A., and praying that such mistake might be corrected; that A. might be ordered to convey the proper premises, and that the title might be quieted, or, if the former proceedings should be held invalid, that the usual decree of foreclosure of the mortgage might be rendered and the land sold thereunder. This action was held by the Supreme Court of Iowa to be properly brought; there was no improper joinder of defendants or of causes of action.²

§ 385. *Contribution.* It is a general rule of the equitable procedure that, in an action to enforce an obligation to contribute and to recover the amounts due from contributors, all the persons liable to make contribution should be joined as defendants, in order that their respective amounts may all be adjusted in a single suit. On the other hand, when several parties are entitled to a share from a common source, and the claims have not been adjusted and made specific and personal, but they all depend upon the same facts and involve the same questions, all the claimants should unite in the action, or at least should be brought

¹ Vaughn v. Cushing, 28 Ind. 184.

² Thatcher v. Haun, 12 Iowa, 303.
This was, in fact, a suit to reform a contract for the conveyance of land, and to

compel a specific performance as reformed, or, in the alternative, for the foreclosure of a mortgage. If the relief was proper, the parties defendant were clearly so.

before the court as defendants if they are not joined as plaintiffs.¹

§ 386. *Actions by Tax-payers.* In many States tax-payers and freeholders are permitted to maintain actions to set aside proceedings by local authorities, and to restrain the enforcement and collection of the tax which is the result of such proceedings, on the ground of their illegality. In such actions not only the officials themselves whose proceedings are sought to be set aside, and the administrative officers whose function it is to enforce the tax, must be made defendants, but also all other persons whose rights or interests may be adversely affected by a decree granting the relief demanded by the plaintiffs. For example, in such a suit brought to set aside the proceedings of certain municipal authorities, and to restrain the levy and collection of a special tax imposed by them for the purpose of paying certain illegal judgments held by different judgment creditors, all these judgment creditors were declared to be necessarily joined as defendants; they had a common interest among them all, centring in the point at issue in the cause.²

§ 387. *Actions to redeem.* In an action by a mortgagor or person holding under him to redeem, all those, in general, should be made defendants whose interests will be affected by the decree. If the mortgagee is living, he is, of course, an indispensable defendant; and if he is dead, his personal representatives, according to the theory of mortgages which prevails in this country. As a general rule, all persons who are interested in the mortgage money or debt secured by the mortgage must be joined.³ Thus, if the mortgage is held by a trustee, the *cestui que trust* should be a codefendant.⁴ If the mortgagee has absolutely as-

¹ Carr v. Waldron, 44 Mo. 393; Story's Eq. Pl., § 169; Madox v. Jackson, 3 Atk. 406; Bland v. Winter, 1 S. & S. 246; Jackson v. Rawlins, 2 Vern. 195; Hart v. Coffee, 4 Jones Eq. 321. In an action by a surety for contribution, the general rule is that all the co-sureties must be made defendants, and the personal representatives of any that are dead, and also the principal debtor. Story's Eq. Pl., § 169a; Ferrer v. Barrett, 4 Jones Eq. 455; Haywood v. Ovey, 6 Mad. 113; Moore v. Moberly, 7 B. Mon. 299; Trencott v. Smyth, 1 McCord Ch. 301.

² Newcomb v. Horton, 18 Wisc. 566, 570, per Cole J., citing Brinkerhoff v. Brown, 6 Johns. Ch. 139; Fellows v. Fellows, 4 Cow. 682; Story's Eq. Pl., §§ 285 et seq.

³ Story's Eq. Pl., § 188; Palmer v. Earl of Carlisle, 1 S. & S. 423; Osbourn v. Fallows, 1 R. & M. 741; McCall v. Yard, 1 Stockt. 358; Large v. Van Doren, 1 McCarter, 208.

⁴ Story's Eq. Pl., §§ 192, 208; Drew v. Harman, 5 Price, 819. Where the mortgagee had assigned the mortgage in trust for his family, it was held that, in

signed all his interest in the mortgage, he is no longer a necessary party in the suit to redeem, but the assignee takes his place; and if there are several successive assignments of such a character, the last assignee is the only necessary defendant.¹ But where the mortgagee has made only a partial assignment, and retains any interest in the mortgage or in the debt secured by it, he must be joined with the assignee as a codefendant.² When the suit is brought, not by the mortgagor, but by a subsequent mortgagee or other incumbrancer, to redeem from a prior mortgage, all the owners of the equity of redemption are necessary codefendants with the holder of such prior mortgage.³ If the mortgagor conveys his entire estate in the land, he need not be made a party in an action to redeem by his grantee.⁴ Persons having partial interests in the equity of redemption, or subsequent liens or incumbrances upon it or upon a portion of it, may redeem; but in such case they must bring in all other parties who are interested in the land; such other persons are necessary parties to the action either as plaintiffs or defendants, in order that all the rights and claims may be determined in one decree.⁵

SECTION EIGHTH.

WHEN ONE PERSON MAY SUE OR BE SUED ON BEHALF OF ALL THE PERSONS INTERESTED.

§ 388. IN immediate connection with the general topics treated in the preceding two sections, there are certain special subjects

an action to redeem, the mortgagee, the trustee and the beneficiaries were all necessary defendants. *Wetherell v. Collins*, 3 Mad. 255.

¹ *Story Eq. Pl.*, § 189; *Chambers v. Goldwin*, 9 Ves. 269; *Hill v. Adams*, 2 Atk. 89; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Williams v. Smith*, 49 Me. 564; *Beals v. Cobb*, 51 Me. 348; *Bryant v. Erskine*, 55 Me. 158, 158.

² *Story's Eq. Pl.*, § 191; *Hobart v. Abbott*, 2 P. Wms. 648.

³ *Story's Eq. Pl.*, §§ 186, 191; *Palk v. Clinton*, 12 Ves. 48; *Lord Cholmondeley v. Lord Clinton*, 2 Jac. & W. 134. As to the necessary defendants in an action for redemption by a subsequent in-

cumbrancer when the prior mortgage has been foreclosed without making him a party, see *Anson v. Anson*, 20 Iowa, 55; *Knowles v. Rablin*, 20 Iowa, 101; *Street v. Beal*, 16 Iowa, 68; *Burnap v. Cook*, 16 Iowa, 149; *Winslow v. Clark*, 47 N. Y. 261, 263; *Dias v. Merle*, 4 Paige, 259; *Bloomer v. Sturges*, 58 N. Y. 168.

⁴ *Williams v. Smith*, 49 Me. 564; *Hilton v. Lothrop*, 46 Me. 297; *Bailey v. Myrick*, 36 Me. 50.

⁵ *Story's Eq. Pl.*, §§ 185, 186; *Henley v. Stone*, 3 Beav. 855; *Chappell v. Rees*, 1 DeG., M. & G. 393; *Fell v. Brown*, 2 Bro. C. C. 278; *Palk v. Lord Clinton*, 12 Ves. 58, 59; *Farmer v. Curtis*, 2 Sim. 466.

which, though subordinate, are sufficiently important to require a separate notice, and they will therefore be considered in the present and the following two sections. The first of these involves an answer to the questions, When may one person sue as the representative of others who, although not named, are regarded as virtual coplaintiffs in the action? and, When may one person in like manner be sued as the representative of others who are regarded as codefendants? The statutory provision permitting this method of bringing the parties before the court is as follows: "When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."¹

§ 389. Following the course which has generally been adopted thus far, I shall first examine this provision of the codes by an independent analysis of its language, and shall then state the interpretation which has been put upon it by the courts. It is very evident that it describes two distinct and separate cases in which a plaintiff or defendant may be clothed with the representative character described, and may thus stand in the place of others whose rights and interests are determined together with his own. These two cases depend upon distinct and separate facts and circumstances, and are as follows: (1) There must be a "question of common or general interest" to *many* persons involved in the action. The two essential elements of this case are, the question of common or general interest to be determined, and the many persons who have this common or general interest in the matter at issue. The "many persons" in this case is opposed to the *very numerous* parties in the other, and is doubtless satisfied by a number actually less. It is certainly not necessary, in order to fulfil its requirements, that there should be any *impracticability* of bringing all the persons having the common or general interest before the court. (2) The second case depends entirely upon the number of the persons who should, according to the ordinary rule, be made plaintiffs or defendants. The single essential element is the impracticability of bringing all the

¹ New York, § 119; Indiana, § 19; Nevada, § 14; Nebraska, § 48; North California, § 882; Wisconsin, ch. 123, Carolina, § 62; Dacotah, § 72; Washington, § 20; Florida, § 70; Ohio, § 87; Kansas, §§ 14, 15; Idaho, § 14; Wyoming, § 88; Iowa, § 2549; Kentucky, § 87; § 42; Montana, § 14. South Carolina, § 142; Oregon, § 881;

parties before the court on account of their great number. The language does not in terms require any question of common or general interest to this great number, but it is difficult to conceive of an action in which a very large number of persons should be capable of joining as plaintiffs—so large that it would be impracticable to bring them all actually before the court—unless the question to be determined was one of common or general interest to them all. It inevitably follows, therefore, from the customary nature of litigations, that these two cases described by the statute are in practice constantly united; they constantly run into each other. In fact, it seldom if ever happens that a suit arises which falls strictly within the terms of the second case, and not within those of the first.

§ 390. Whenever these provisions are invoked, in order that a plaintiff may be entitled to sue or a defendant to be sued in the representative character described, the facts showing that the requirements of either case have been complied with must not only exist, but must be alleged by the plaintiff as the very ground and reason for adopting the peculiar form of action permitted by the statute. The complaint or petition must show either that many persons have a common or general interest in the questions involved in the action, or else that the number of persons who would be joined as plaintiffs or defendants, if the ordinary rule was applied, is so very great that it is impracticable to make them all actual parties. Unless the pleading contains these averments, the action must be regarded as though brought by the single plaintiff or against the single defendant named. It should be carefully observed that this provision does not create any new rights of action, nor enlarge any of those now existing. The suit cannot be sustained by one as the representative of the many others who really sue in his name, unless it could have been maintained if all these many others had been regularly joined as coplaintiffs, or unless it could have been maintained by each of them suing separately and for himself. The statutory provision is simply a matter of convenience, a rule of form, a means of enabling many persons to have their rights determined without their actual appearance in court as litigant parties.

§ 391. Passing to the judicial interpretation of the clause, I shall ascertain, from an examination of the decided cases, (1) when one person may sue or be sued in a representative capacity;

and (2) the purpose and object of such form of action, and especially its effects upon the rights and duties of the other persons who are represented in and by the actual party. The conclusions reached in the preceding paragraphs as to the meaning of the provision, and the two distinct cases mentioned in it, are fully sustained by the authorities. The construction of this section of the codes has been established by the courts, and the rule is settled as already stated, that, where the question to be decided is one of "common or general interest" to a number of persons, the action may be brought by or against one for all the others, even though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but, on the other hand, when the parties are so very numerous that it is impracticable to bring them all into court, one may sue or be sued for all the others, even though they have no common or general interest in the questions at issue;¹ and the necessary facts to bring the case within one or the other of these conditions must be averred.²

§ 392. This section of the codes is a re-enactment of a rule which had prevailed in equity, and is to receive a construction which will make it identical with that pre-existing doctrine. Although the case secondly mentioned omits the element of a "common or general interest," and speaks only of the very great number as the sole ground for permitting one to sue or to be sued for all the others, yet even in this case there must be some connection between the parties who are to be represented, according to the familiar principles of equity procedure. The right

¹ *McKenzie v. L'Amoureux*, 11 Barb. 516. An action by certain legatees, on behalf of all the legatees, against an executor for an account, settlement, and payment of their legacies. Harris J. distinguished between the phrases "parties united in interest" and "parties having a common or general interest." He declares that the last clause of the section "applies indiscriminately to all actions whether they involve questions of common interest or not." See also *Towner v. Tooley*, 38 Barb. 598, 607. The rule thus laid down by the courts must be regarded simply as a construction of the statute; it does not purport to go any further, and to modify other familiar equity doctrines in reference to the joinder of parties.

² *Bardstown, &c. R. R. v. Metcalf*, 4 Metc. (Ky) 199, 204. A trustee under a railroad mortgage, given to secure bondholders, sued to foreclose. The court held that the plaintiff could not maintain the action, as a representative of the bondholders, under the first subdivision, because he sued as a trustee and not as a bondholder, and there was no common or general interest between him and them, and also because he failed to aver their number, or even that they were many; he could not, under the second, because he had not alleged that the bondholders were numerous, and that it was impracticable to bring them all before the court.

which the suit is brought to assert must in some manner or degree belong to all who are represented by the actual plaintiff; and all the persons who are represented by the actual defendant must have some interest adverse to the demand for relief set up by the action. The parties thus represented by the plaintiff or defendant may not be in privity with each other, but there must be some bond of connection which unites them all with the questions at issue in the action. The test would be to suppose an action in which all the numerous persons were actually made plaintiffs or defendants, and if it could be maintained in that form, then one might sue or be sued on behalf of the others; but if such an actual joinder would be improper, then the suit by or against one as a representative would be improper, notwithstanding the permission contained in this section of the statute.¹

§ 393. The provision applies both to legal and to equitable actions, since no restriction or limitation is contained in its language; but when the second case is relied upon, the parties must be so numerous that it is really impracticable to make them all actual

¹ *Reid v. The Evergreens*, 21 How. Pr. 319, 321, per Emmott J., citing Story's Eq. Pl., § 123; *Adair v. New River Co.*, 11 Vesey, 444; 1 *Turner & Russ.* 297; 2 *Sim.* 369. This was an action to declare void divers bonds issued by a corporation which was a defendant. The bonds were of different classes and kinds, and their alleged illegality did not depend upon the same questions. The complaint made one bondholder a defendant, alleging that the bondholders were very numerous, &c. The action was held improper; the other bondholders could not be bound by a judgment against the one. If there was a common question affecting them all, they might be so bound. For a discussion of the general doctrine of equity in its application to plaintiffs, see 1 *Dan. Ch. Pl.* (4th Am. ed.), pp. 285, 237-239; Story's Eq. Pl., §§ 94 *et seq.* This doctrine includes three classes of cases which are, in fact, identical with the two classes mentioned in the codes,—namely (1), where the question is one of common or general interest; (2) where the parties compose a voluntary association, and those who sue or defend represent the whole; (3) where the parties are very numerous, and although they have, or

may have, separate interests, yet it is impracticable to bring them all before the court. Story's Eq. Pl., § 97. Among the most familiar instances are suits by creditors seeking to establish their claims against the estate of a common debtor. 1 *Dan. Ch. Pl.*, pp. 235, 237; Story's Eq. Pl., §§ 99-103; and legatees or next of kin, 1 *Dan. Ch. Pl.*, p. 238; Story's Eq. Pl., §§ 104-106; *Brown v. Ricketts*, 3 *Johns. Ch.* 553; *Fish v. Howland*, 1 *Paige*, 20, 23; *Hallett v. Hallett*, 2 *Paige*, 18-20, 21. For further illustrations in cases of voluntary associations and the like, see Story's Eq. Pl., §§ 107-115 *b*; 1 *Dan. Ch. Pl.*, pp. 238, 239. The same principle applies, under similar circumstances, to defendants. 1 *Dan. Ch. Pl.*, pp. 272, 273; Story's Eq. Pl., §§ 116 *et seq.*; *Wood v. Dummer*, 3 *Mason*, 815-819, 321, 322; *Gorman v. Russell*, 14 *Cal.* 531; *Cullen v. Duke of Queensberry*, 1 *Bro. C. C.* 101; 1 *Bro. P. C.* 896. The modern tendency in courts of equity has been towards a relaxation of the original rule as to bringing in all the parties interested, and towards a free application of this doctrine as to representation among the persons interested.

plaintiffs or defendants; and it has been held that the number thirty-five was not sufficiently great.¹ When one sued on behalf of an association by its name, upon a promissory note, and alleged in his complaint that it was unincorporated, and that its members were very numerous, the *mere* facts thus alleged were held to be insufficient.² Undoubtedly, in such a case the plaintiff should sue on behalf of the persons who compose the society, and not on behalf of the society itself. Indeed, this point has been directly decided. It is held that, in case of such a society whose members are too numerous to bring them all before the court, the plaintiff must make one of them a defendant as a representative of the others, and not make the association a defendant.³

§ 394. The following are some particular instances in which these principles have been applied, and in which it has been held that the action might be maintained by one or more for the benefit of the others. One creditor may sue on behalf of all the other creditors in an action to enforce the terms of an assignment in trust for the benefit of creditors, to obtain an accounting and settlement from the assignee and other like relief; also, in an action to set aside such an assignment on the ground that it is illegal and void; and also one judgment creditor may sue on behalf of all other similar creditors in an action to reach the equitable assets, and to set aside the fraudulent transfers of the debtor. In all these classes of cases the creditors have a common interest in the questions to be determined by the controversy.⁴ When a mortgage had been given by a railroad company to a trustee in order to secure bondholders, and he desired to obtain directions of the court in respect to the payment of coupons, and brought an action for that purpose, and alleged in his complaint that the holders of the coupons were very numerous, so that it

¹ *Kirk v. Young*, 2 Abb. Pr. 453, per Clerke J. at S. T. Undoubtedly, a number much less than thirty-five would be sufficient when a "common interest" is set up. In an action by creditors, it was held, by a very able English judge, that twenty was too small a number. *Harrison v. Stewardson*, 2 Hare, 530.

² *Habicht v. Pemberton*, 4 Sandf. 657, per Duer J. This action would certainly fall within the first case, since the members, being all owners of the note, had a "common interest."

³ *Keller v. Tracy*, 11 Iowa, 530. The society was an unincorporated church. The objection that plaintiff cannot sue alone, but should sue on behalf of all others similarly situated, must be taken by demurrer or answer, or is waived. *Stewart v. Erie, &c. Co.*, 17 Minn. 372, 398.

⁴ *Greene v. Brock*, 10 Abb. Pr. 42; *Brooks v. Peck*, 38 Barb. 519. See Story's Eq. Pl., §§ 99-103; 1 Dan. Ch. Pl. (4th Am. ed.), pp. 235, 237. Twenty creditors was held to be too small a number in *Harrison v. Stewardson*, 2 Hare, 530.

was impracticable to bring them all before the court, it was held proper, and within the provision of the code, to make a few of these persons defendants as the representatives of all the others, with suitable averments showing the reasons for such a form of action.¹ Conversely, a suit can be maintained by one on behalf of all to foreclose a mortgage when the number of mortgagees, or of bondholders, is large. It would be hardly necessary in such a case that the number of persons should be so great as to make it impracticable to bring them all in; they have a common interest in the questions at issue.² The provision also applies to actions by distributees for their shares, and by legatees brought to settle the estate and to recover their legacies;³ and to actions by heirs to set aside a deed or will of their ancestor.⁴ In both these cases there is a common interest among the claimants.

§ 395. An action by members or shareholders of an unincorporated association for a dissolution, winding up, and division, or for other like relief, plainly falls within the statutory provision, and may be brought by one of the associates in a representative capacity. In some instances the proceeding would plainly fall within the first subdivision, since there would be a common interest among all the members or shareholders; in other instances, it might, perhaps, fall within the second, and be based upon numbers alone.⁵ The question, whether one tax-payer or freeholder can sue for the benefit of others similarly situated, to restrain or set aside the acts of local officials done under color of authority, can only be properly considered and determined by those courts which hold that such actions are proper in their general form. Wherever this particular kind of action is condemned *in toto*, the decision of the particular point now referred to must, of course,

¹ *Coe v. Beckwith*, 10 Abb. Pr. 296. See *Reid v. The Evergreens*, 21 How. Pr. 319.

² *Blair v. Shelby Co. Agr. Soc.*, 28 Ind. 175. Action on behalf of one hundred and thirty-eight mortgagees. *Bardstown, &c. R. R. v. Metcalf*, 4 Metc. (Ky.) 199.

³ *McKenzie v. L'Amoureux*, 11 Barb. 516; *Towner v. Tooley*, 88 Barb. 598. In the first of these cases the number of persons represented by the plaintiff was three. *Story's Eq. Pl.*, §§ 104, 105; 1 Dan. Ch. Pl. (4th Am. ed.), p. 288; Hal-

lett *v. Hallett*, 2 Paige, 18-20, 21; *Fish v. Howland*, 1 Paige, 20, 23; *Brown v. Ricketts*, 3 Johns. Ch. 553.

⁴ *Hendrix v. Money*, 1 Bush (Ky.), 306.

⁵ *Warth v. Radde*, 18 Abb. Pr. 396; *Gorman v. Russell*, 14 Cal. 581; *Von Schmidt v. Huntington*, 1 Cal. 55; *Stewart v. Erie and West. Trans. Co.*, 17 Minn. 372, 398; *Cockburn v. Thompson*, 16 Ves. 321; *Story's Eq. Pl.*, §§ 107-115*b*; 1 Dan. Ch. Pl. (4th Am. ed.), pp. 288, 289. In reference to defendants, see *Story's Eq. Pl.*, §§ 116-185.

be entirely *extra-judicial*. In the States which permit such suits by a tax-payer or freeholder generally, there is some conflict of opinion in respect to the question, whether one can sue on behalf of others similarly situated with himself. It has been held in Wisconsin that an action cannot be maintained by one tax-payer as a representative of all others in a local district, to prevent the enforcement of an alleged illegal tax which would be a lien upon real estate, on the ground that the lands owned by the individual tax-payers, and affected by the tax, are distinct and separate parcels, and there is no common interest among the owners thereof. The conclusion was that each tax-payer must sue separately.¹

§ 396. I pass now to consider the nature of an action brought by one on behalf of others, and its effects upon the rights and duties of those who are represented by the actual plaintiffs. The persons not named in such cases are not parties to the suit unless they afterwards elect to come in and claim as such, and bear their proportion of the expenses. It is optional with them whether they will become parties or not, and until they so elect they are, in the language of the books, "in a sense deemed to be before the court."² They are so far before the court, that if they neglect, after a reasonable notice to them for that purpose, to come in under the judgment and establish their claims, the court will protect the defendants and parties named from any further litigation in respect of the same fund or other subject-matter, especially so far as such litigation may tend to disturb the rights of the parties as fixed by the judgment. A person who elects to come in and make himself a party, must apply for an order making him such, and upon the granting the order he is to all intents and purposes a party.³

§ 397. This rule, which is merely the doctrine and practice of equity applied to cases arising under the statutory provision,

¹ Newcomb v. Horton, 18 Wisc. 566. See the cases on the subject of tax-payers and freeholders uniting, collected, *supra*, in § 269. When they are permitted to join in an action, one is suffered to sue as a representative of all others similarly situated. In North Carolina, one citizen has been permitted to sue on behalf of others in an action to test the validity of an election; and, conversely, another citizen was suffered to appear and defend the

suit on behalf of his fellow-citizens of the town. Perry v. Whitaker, 71 N. C. 477.

² Story's Eq. Pl., § 99; Adair v. New River Co., 11 Ves. 444.

³ Stevens v. Brooks, 22 Wisc. 695, 703, 704, per Dixon C. J.; Hallett v. Hallett, 2 Paige, 18, per Walworth, Ch.; Good v. Blewit, 19 Ves. 336, 339, per Lord Eldon; Story's Eq. Pl., § 99; Barker v. Walters, 8 Beav. 92.

has not been acquiesced in by all the courts. In Kentucky, where the chancery has always existed as a separate tribunal, and where even under the code there is a nominal distinction kept up between legal and equitable actions, it is held that the assent of those who are not actual parties, but who have a common interest with their representative, will be presumed unless they show their disapproval by some act indicating the dissent.¹ This is in direct conflict with the rule first stated. According to the one, the persons who are represented must do some affirmative act of approval and adoption, and regularly this act should be an application to the court, and the obtaining an order declaring them to be in all respects parties; according to the other, these persons must do some act of disaffirmance and rejection, but what particular act is not disclosed.

§ 398. The question whether any specified person among the number of those represented had made himself or was a party to the suit, may present itself in two very different aspects, and its answer may be necessary for two very different purposes. In the first place, the question may be, whether this individual, as against the defendants in the action, and perhaps as against those who were the original plaintiffs, or who had made themselves such, is entitled to the immediate benefits of the recovery, to a share in the relief granted by the court in its decree. It is evident that, under this aspect of the matter, a slight affirmative act of assent and adoption may be sufficient if the person is then willing and does contribute his share to the expenses of the litigation. The nature of the cause of action may be such that, if the relief is granted at all, it will necessarily inure to the benefit of all who may be situated in the same position as the actual plaintiff. On the other hand, the cause of action may be such that a separate application will be necessary to bring each person within the operation of the judgment, although the decision made in one case may control that in all others; as, for example, in a creditors' suit to set aside fraudulent transfers of the debtor's land, and let in the liens of the plaintiffs' judgments, a separate action of the court is necessary in the case of each judgment creditor, in order that he may reap the benefit of the general decision pronouncing the debtor's transfer to be void.

§ 399. In the second place, the question may be whether the

¹ Flint v. Spurr, 17 B. Mon. 499, 513.

specified individual who is one of those represented by the actual plaintiff, is concluded and bound by the judgment rendered in the action. This question will generally arise at a subsequent time, and in another action brought by or against the individual, and involving the same issues as those embraced in the former controversy.¹ Is this person bound by the former judgment? Of course he is not bound unless he was practically a party to the proceeding; the plainest principles of common justice refuse to hold a man concluded if he has not had "a day in court." When the matter is presented in this aspect, the strict rule of the equity courts first above stated must be controlling. If the subsequent proceeding is a hostile one against the person, the former adjudication cannot be relied upon as an estoppel or as conclusive, unless he had affirmatively taken the steps which made him an actual party by adopting the suit with all its burdens and benefits, or unless, after having had notice, and an opportunity of coming in and making himself such a party, he had refused or neglected to do so. If, however, this subsequent proceeding is on behalf of the person, set in motion by him, the same doctrine must apply; he cannot under exactly the same circumstances claim and receive the benefits of the former litigation, but disclaim and be freed from its burdens and disabilities.

§ 400. The conclusion to which I arrive from the foregoing discussion may be summed up as follows: There may be a marked difference in the manner of enforcing the rule, or even in the rule itself, depending upon the position of the litigation, and the situation of the person who invokes its aid or against whom it is invoked. If the prior suit is still pending, and the purpose of the claimant who belongs to the class of persons represented by the actual plaintiff or defendant, be to take a practical part in the controversy, or to share the benefit of the judgment which has been or may be rendered, his mere act of making the claim, coupled with a willingness to bear his share of the expenses, will be of itself a sufficiently positive and affirmative act to make him a party to the proceeding and entitle him to his personal relief. Even in this case, however, the action may be of

¹ This was the situation of the parties which the strict equity rule was enforced. and of the facts in the case cited in a *Stevens v. Brooks*, 22 Wisc. 695. preceding paragraph from Wisconsin, in

such a nature and the judgment of such a character, that a separate order or adjudication of the court will be necessary in order to determine the particular rights under the general decree of each party, and to award to him his special portion of the general relief. The case already mentioned of the different judgment creditors interested in the result of an ordinary creditors' suit, is a sufficiently illustrative example. If, however, the prior suit has been terminated, and the question arises in a subsequent controversy, and involves the conclusive effect of the former adjudication upon the class of persons represented by the actual parties, in order that such judgment should be conclusive upon any particular person of the class either in his favor or against him, there must have been the previous formal act on his part of applying to the court, and an order thereon making him a party to the action, so that his name should have appeared in some manner upon the record; or it must be shown that he had notice of the proceedings, and an opportunity to unite in them of which he neglected or refused to avail himself. These views and conclusions reconcile the decisions which at first sight appear to be conflicting, and they present a practical and harmonious rule of procedure.¹

§ 401. It has already been stated that the complaint or petition should contain averments which bring the action within one or the other of the cases mentioned in the section of the codes. The allegations showing the existence of a common or general interest in the questions at issue in the one case, or the impracticability on account of numbers of bringing all the persons before the court in the other, should be positive and specific, so that if denied, an issue may be raised upon them. It is not

¹ See, on this subject, Story's Eq. Pl. §§ 99, 106; *David v. Frowd*, 1 Myl. & K. 200; *Gillespie v. Alexander*, 8 Russ. 180; *Farrell v. Smith*, 2 Ball & B. 387; *Cockburn v. Thompson*, 18 Ves. 327; *Good v. Blewit*, 19 Ves. 386, 389; *Leigh v. Thomas*, 2 Ves. 812, 813; *Hendricks v. Robinson*, 2 Johns. Ch. 283, 296; *Hallett v. Hallett*, 2 Paige, 18, 19. The equity practice in this class of cases is, upon rendering the interlocutory decree, to advertise for all the represented persons to appear before a master within a specified time and establish their claims, and make themselves parties to the suit; and upon the master's

report of such applicants, the final decree is made. After such final decree, the defendant will, in general, be protected. But if any creditor, or other person represented by the actual plaintiff, should not have received notice, and there was no default or want of diligence on his part, he may be permitted to recover his share, not from the defendant in the original action, but from those who had united with the plaintiff, and received in the distribution more than the amount to which they were justly entitled. See *David v. Frowd*, 1 M. & K. 200.

necessary, however, that the persons who, it is alleged, have the common or general interest, or who, it is said, are so numerous that they cannot all be brought before the court, should be named, nor be described with particularity; nor is it necessary that they should be an association or special class, or be described as such.¹ The general averment descriptive of the persons as a whole is enough; and the question whether any particular individual is included within it will arise, and must be decided upon his application to be admitted as a participant in the suit while in progress, or in the relief after judgment. If any opposition is made to his application, the matter will be sent to a master or referee to hear and report, and upon his report the court will make the proper order admitting or rejecting the applicant.²

SECTION NINTH.

PERSONS SEVERALLY LIABLE UPON THE SAME INSTRUMENT.

§ 402. The subject-matter of this section has already been treated in a general manner in the discussions relating to joint, joint and several, and several liabilities, and to actions thereon, and to the changes wrought in the common-law rules regulating the same, which are contained in the seventh section of this chapter. It is of so great importance, however, and the statutory provisions have made so sweeping an alteration in the ancient law, and withal there is so marked a difference in the special legislation of the State codes upon this particular topic, that the subject demands an independent and thorough examination. The statutory provisions themselves must be separated into two classes. The first class, which is found in most of the codes, embraces special rules relating only to persons *severally* liable upon the same instrument, and the language which embodies the enactment is substantially alike in all the statutes which contain the provision at all. The second class, which is found in a portion only of the codes, is much more sweeping and radical in its changes; it embraces rules relating to joint, joint and several, and several liabilities arising upon all contracts; while the language used by the legislatures is not the same in any two of the codes.

¹ *Sourse v. Marshall*, 28 Ind. 194.

² *Stevens v. Brooks*, 22 Wisc. 695.

§ 403. I quote these two classes of provisions separately. —
First Class. "Persons severally [and immediately, *Ind.*] liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes [and sureties on the same or separate instruments, *Cal., Nev.*], may all or any of them be included in the same action at the option of the plaintiff."¹ In Kentucky, the section is somewhat varied, and reads as follows: "Persons severally liable on the same contract, including the parties to bills of exchange and promissory notes, common orders and checks, and sureties on the same or separate instruments, may all or any of them, or the representatives of such as may have died, be sued in the same action at the plaintiff's option."²
—Second Class. The Missouri code contains the following: "Every person who shall have a cause of action against several persons, including parties to bills of exchange and promissory notes, and be entitled by law to a satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper, and an executor or administrator or other person liable in a representative character may be joined with others originally liable at the option of such person."³ According to the last revision of the California code, "All persons holding as tenants in common, joint tenants, or *coparceners*, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party."⁴ A section is found in the Nevada code nearly the same as the foregoing in most respects, but with one very marked difference: "Tenants in common, joint tenants, or *copartners*, or any number less than all, may jointly or severally bring or defend, or continue the prosecution or defence of any action for the enforcement of the rights of such person or persons."⁵ The changes in the common law

¹ New York, § 120; Kansas, § 39; Oregon, § 86; Nevada, § 15; South Carolina, § 148; California, § 883; Minnesota, § 35; Wisconsin, ch. 123, § 21; Nebraska, § 44; Florida, § 71; Ohio, § 88; Indiana, § 20; North Carolina, § 68; Dacotah, § 73; Washington, § 16; Idaho, § 15; Wyoming, § 48; Montana, § 15. The provision in Idaho, Wyoming, and Montana is the same as in California and Nevada.

² Kentucky, § 88.

³ Missouri, § 7.

⁴ California, code of 1872, § 884; originally statute of 1867, p. 62.

⁵ Nevada, § 14. This section is plainly copied from the California statute of 1867. The change from "coparceners" to "copartners" is remarkable. The use of the word "coparceners" was natural, perhaps, though doubtless entirely unnecessary in the earlier enactment, for certainly no estate in "coparcenery" exists in California. The word used in the Nevada

made by the Iowa and Kentucky codes are radical and complete. In the former: "When two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, and including the parties to negotiable paper, common orders, and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against all or any of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all of such representatives. An action or judgment against any one or more of several persons jointly bound, shall not be a bar to proceedings against the others."¹ The corresponding section of the Kentucky code differs from this verbally rather than substantially: "When two or more persons are jointly bound by contract, the action thereon may, at the plaintiff's option, be brought against all or any of them. When any of the persons so bound are dead, the action may be brought against any or all of the survivors, with the representatives of any or all of the decedents, or against the latter or any of them. When all the persons so bound are dead, the action may be brought against the representatives of all or of any of them. An action or judgment against one or more of several persons jointly liable, shall not be a bar to proceedings against the others."² Substantially, the same change in the common law is made by the North Carolina code.³

§ 404. These two classes of legislative enactments must be examined separately. The provisions of the first class relate solely to persons *severally*, as opposed to those jointly or jointly and severally liable. The term "severally liable" has long had a well-known technical meaning in the law, and is plainly used

code, unless treated as a mistake, produces a most violent and exceptional change in the prior law. The language is not broad enough to cover all joint liabilities arising from contract; the single case of partnership liability is excepted. The same is found in the code of Wyoming, § 42. See also Kans. Gen. Stat. (1888), ch. 21, §§ 1-4, and Mo. Wag. Stat., vol. 1, p. 269, §§ 1-4, which entirely abrogate all the common-law doctrines as

to joint liability on contract in those States.

¹ Iowa, § 2550.

² Kentucky, § 39.

³ Code of North Carolina, § 63 a. "In all cases of joint contract of copartners in trade, or others, suits may be brought and prosecuted on the same against all or any number of the persons making such contract." See *Merwin v. Ballard*, 66 N. C. 168.

with that meaning in this connection. The modification of the former rules made by this section is therefore quite restricted. Again, this several liability must arise from the fact that the persons are all parties to one single instrument, except that in a few States sureties upon separate instruments are also included. This latter clause is probably intended to cover the case, which is not infrequent, of two or more official or other bonds given on behalf of the same principal and to the same obligee, and intended to secure the same object, the rights and obligations of the sureties thence arising being the same as if they had all executed a single undertaking.¹ In the third place, there is no limit upon the kind of contract from which this several liability may arise, provided it is in writing. The broad language of the clause includes any and every species of written contract. The instances given of bills, notes, checks, orders, &c., are illustrations merely, and do not restrict the operation of the section to themselves. The result is, that the provision as a whole has the same force and effect in all the States of whose codes it forms a part, with the single exception, already noticed, in reference to sureties upon separate instruments. Fourthly, no change is made in the prior rules of law which define the nature of "several liability." The contracts from which such a liability arises, and the cases in which it exists, are left as the codes found them. Finally, the only change made by the section is, that while the common law required a separate action by the creditor against each one of the persons thus severally liable, he is now permitted at his option to sue all, one, or any of them. How far the provision permits the joinder of the personal representatives of deceased parties with any or all of the survivors as codefendants, must be a matter for judicial construction; that found in the Kentucky code removes all possible doubt by expressly authorizing such a proceeding. The second class of provisions goes to the root of the matter, and practically destroys all distinction between joint, joint and several, and several liabilities, in respect of actions against the original parties, and of those against the survivors and the representatives of such as have died. These enactments are so express, so full, and so plain in their language, that they leave very little room for forensic exposition or judicial interpretation.

¹ See *Powell v. Powell*, 48 Cal. 284.

§ 405. From this analysis of the language I proceed to the judicial interpretation which has been put upon it. Most of the conclusions contained in the foregoing paragraph result so plainly from the express terms of the statute, that no doubt can be entertained of their correctness, and no necessity can arise for judicial construction. It will be found, therefore, that the decisions based upon this section have generally turned, not upon any question as to its meaning, but upon points of the former law. Nearly all of these cases will be seen, when we get at the *ratio decidendi*, to have determined either that the parties were or were not severally liable, or that they were or were not liable upon the same instrument. These points, I say, are preliminary only, and do not belong to any exposition of the statutory provision itself; they simply settle the question whether or not the particular case falls within its terms. The decisions to be cited will illustrate this statement, and show its correctness. In a leading case, giving a construction to the section, the New York Court of Appeals said: "It relates to several, and not to joint liabilities. The latter did not require the aid of a special provision. It relates in terms to cases where a plurality of persons contract several obligations on the same instrument."¹ The Supreme Court of Wisconsin has expressed itself to the same effect. "The language of this statute is very clear and positive, and no doubt can exist as to its meaning. It has changed the rule of the common law with respect to the actions which it mentions. No demurrer can now be sustained for the nonjoinder or misjoinder of parties defendant where a part only of the persons severally liable are included in the action, and the rest omitted, and that fact appears on the face of the complaint."²

§ 406. The terms of the statute are so broad and unrestricted, that they include every kind and form of written contract upon which the parties thereto are made severally liable. It is not necessary that they should be bound for the same identical demand or debt, nor that each should be responsible for the aggregate amount of all their several liabilities. In other words, it is not necessary that the judgment should be a joint one for the same single debt, nor even a separate judgment against each for that one sum, nor, as it would seem, a separate judgment against

¹ Carman v. Plass, 28 N. Y. 236, 237, per Denio J.

² Decker v. Trilling, 24 Wisc. 610, 612, per Dixon C. J.

each for the same sum. If a contract should be made by a number of promisors, by which each bound himself in an amount different from that of all the others, the liability would plainly be several, and the agreement itself would be embraced within the terms of the section. The Supreme Court of Kentucky has used the following language in reference to such a contract. "In this case there is but one contract, and it is the same contract between the same parties, but several as to its obligation. And neither the language nor the presumed object of the section can be constructively restricted to a several contract binding each separate obligor for the whole amount of their aggregate liabilities. The letter of the section certainly authorizes no such restriction; and the policy of avoiding a vexatious multiplicity of actions for the breach of the same contract, would apply equally to every contract made at one and the same time by the same parties severally liable upon it."¹ Upon this doctrine a joint action was sustained against twenty-seven persons who had executed the following undertaking: "We the undersigned agree to become bound to A. as sureties for B., each for the sum of \$100, for any goods he may buy of said A., each of us to be bound for \$100 and no more, it being the true intent and meaning that each incurs for himself a separate liability for \$100."² Although such an action is brought against all the debtors, and thus *appears* to be joint, the judgment of course is not joint but separate, that is, against each for the amount of his own liability. It could certainly make no difference in the principle if the parties to such an agreement each undertook a different amount of liability instead of all incurring the same. These views have been approved, and it has been expressly held that when persons are bound for separate sums by the same instrument, and are sued jointly, a separate judgment should be entered against each for the amount of his individual indebtedness.³ The case thus resembles the ordinary contract of subscription, which in accordance with the principle of the decisions above quoted would clearly be embraced within this section.

§ 407. The question has been raised whether in an action, under this provision of the codes, against all or some of the persons thus severally liable upon the same instrument, a joint

¹ *Wilde v. Haycraft*, 2 Duval, 809, 811, per Robertson J.

² *Ibid.*

³ *People v. Edwards*, 9 Cal. 286.

judgment against the defendants can ever be proper, and whether the final determination of the court should not be in the form of a separate judgment against each for his individual liability.¹ It has been said that the statute permitting debtors severally liable to be sued jointly, and the joint action brought in accordance therewith, do not make them *jointly* liable; and it can make no possible difference in the application of this principle, whether each person is severally bound on the contract for the same or for a different sum.² An action against the maker, and the personal representatives of a deceased indorser of a promissory note has been sustained under this section, but it was held that a joint judgment against them could not be rendered. This ruling was placed upon the ground that the judgment against one must be *de bonis propriis*, and against the other *de bonis testatoris*.³ The whole subject has been ably and exhaustively treated by the Supreme Court of Wisconsin, and I shall quote their discussion and conclusions. The action was upon a joint and several promissory note, the plaintiff electing to treat it as several, and proceeding to sue two only of the five makers. He had obtained a joint judgment for the amount of the note against both, and each was of course liable for that entire amount. The court say: "Another objection is to the form of the judgment. The judgment is a joint one against both of the defendants, instead of being several against each. It is urged that this is erroneous. It is contended that the option given to the plaintiff to include in the action all or any of the persons thus severally liable, is to enable him to accomplish in one action what by the former practice required several actions,—that is, to enforce in the action the several liability of each defendant in the same manner as if a separate suit had been brought against him. But for its being obviated by a provision of the statute to which I shall presently refer, this objection would be fatal to the judgment. The form of the judgment is not directed by the statute authorizing persons thus severally liable to be included in the action. The second subdivision of § 11 of chapter 124 of the Revised Statutes

¹ The case of an action against the makers and indorsers of a note or bill is special. A suit against them resulting in a joint judgment for the amount due, is permitted by express statutes passed long prior to the new procedure.

² *Kelsey v. Bradbury*, 21 Barb. 531; *Parker v. Jackson*, 16 Barb. 83.

³ *Eaton v. Alger*, 47 N. Y. 846; 2 Keyes, 41; *Churchill v. Trapp*, 3 Abb. Pr. 806. See also *Burgoyne v. O. L. Ins. & T. Co.*, 5 Ohio St. 586.

of Wisconsin¹ has no relation to the question, because, as held by the Court of Appeals in *Pruyn v. Black*,² the words there used, "defendants severally liable," mean defendants liable separately from the defendants not served, though jointly as respects each other. And the provisions of § 26 of chap. 132 of the Revised Statutes of Wisconsin³ do not affect it, for the reason that the judgment there authorized against one or more of several defendants is only when a several judgment may be proper. It seems to me to be left therefore for the courts to determine according to the general principles of the law governing the subject what the form of the judgment shall be; and, acting upon these principles, it seems very clear to me that the judgment should follow the nature of the claim established; and if that is separate and several as against each defendant, then the judgment should be so."⁴ The judgment in this case was not, however, reversed, since another section of the Wisconsin code requires the court to disregard any error which does not affect the substantial rights of the parties.

§ 408. Although persons jointly and severally liable on a contract are not mentioned in this section of the codes, it is within the option of the promisee or obligee in such an agreement to treat it as several, and by his act to render it so to all intents and purposes. A joint and several contract has been held, therefore, to fall within the scope and operation of the provision; and the creditor, in pursuance of its permission, has the election to sue each of the debtors singly, or to sue all, or to sue any number of them.⁵ The question might arise, whether, if he elected to sue all, the contract would be regarded as joint in accordance with the former practice, or whether by virtue of this statutory enactment it would be taken as several. I am not

¹ This section provides for taking judgment against some of the defendants "severally liable" in an action, when the others have not been served. It is the same as ch. 124, § 18, of the last revision.

² *Pruyn v. Black*, 21 N. Y. 800.

³ This section is the general provision relating to judgments, permitting judgment to be rendered for some of the defendants, and against the others, under certain circumstances; it corresponds to the present ch. 132, § 29.

⁴ *Decker v. Trilling*, 24 Wisc. 610, 618, per Dixon C. J.

⁵ *Decker v. Trilling*, 24 Wisc. 610, 612; *Clapp v. Preston*, 15 Wisc. 543; *Burgoyne v. O. L. Ins. & Tr. Co.*, 5 Ohio St. 586; *People v. Edwards*, 9 Cal. 286; *People v. Love*, 25 Cal. 520, 526. Action on a joint and several bond. The court held it governed by the statute as though several. It has been said, therefore, that this provision has in effect destroyed joint and several liability arising on single express written contract.

aware that this question, which perhaps has little practical importance, has been passed upon by the courts.

§ 409. It has been decided in many cases, and undoubtedly the weight of authority sustains this ruling, that a guarantor and the principal debtor cannot be sued together in one action; even though the guaranty be written upon the same paper with the agreement which it undertakes to secure. It is said that the principal debt and the collateral undertaking do not constitute one instrument, and the parties therefore do not come within the language of the statute.¹ A different rule, however, prevails in Iowa, and it is there held in a series of cases, that the guarantor and the principal debtor may be sued in one action, since they are liable for the same debt, and are, within the meaning of the section, bound upon the same instrument.²

§ 410. A surety or guarantor may be joined as a codefendant with his principal if the contract be in such a form and of such a nature that his *liability arises from the same instrument*. A lease made between the lessor of the first part, and the lessee A. of the second part, and B. of the third part, contained the usual clauses of demise to A. and covenants on his part to pay rent &c., and also a covenant, on the part of B., whereby "he did, in consideration of the premises and of the sum of one dollar, guarantee unto the lessor the payment of the aforesaid rent, and the faithful performance of the covenants in said lease contained." The instrument was signed and sealed by all the parties. The New York Court of Appeals held that the lessor might, by virtue of the section under consideration, maintain an action against A. and B. to recover a sum due for rent. The case was distinguished from the others cited above, in reference to ordinary guaranties, since the parties to this lease were made liable by the same instrument.³ I cannot refrain from expressing the opinion

¹ *Le Roy v. Shaw*, 2 Duer, 626; *De Ridder v. Schermerhorn*, 10 Barb. 638; *Allen v. Fosgate*, 11 How. Pr. 218; *Phalen v. Dingee*, 4 E. D. Smith, 879; *Carman v. Plass*, 23 N. Y. 286, 287, per Denio J.; *Bondurant v. Bladen*, 19 Ind. 160; *Virden v. Ellsworth*, 16 Ind. 144.

² *Tucker v. Shiner*, 24 Iowa, 334; *Mix v. Fairchild*, 12 Iowa, 361; *Marvin v. Adamson*, 11 Iowa, 371; *Peddicord v. Whittam*, 9 Iowa, 471. In all these cases

the guaranty was executed by the payee upon a note when he transferred the same, so that the decisions do not go beyond these facts. The court, however, placed their judgment upon the broad ground as stated in the text, and made no allusion to the special facts, nor to the particular relation of the payee to the maker, and the resemblance of such a guaranty to an indorsement.

³ *Carman v. Plass*, 23 N. Y. 286, 287

that this is a distinction without a difference. Believing that the decision of the court was right, it is impossible to discriminate the cases of ordinary guaranties from it by any valid and substantial reasons. By permitting parties to a contract resembling this lease to be joined in a single action, and refusing to admit the same form of suit against a principal debtor and his guarantor, whose undertaking is perhaps indorsed upon the same writing, the courts in fact make the nature of their obligation to depend upon the position of the written matter on the paper, and not upon the terms and nature of their agreements. The rules of procedure, as established by the reformed system, were never designed to be controlled by such considerations. The judicial decisions which illustrate the second class of provisions quoted at the commencement of this section have already been cited and discussed in section seventh, and need not be repeated here.

SECTION TENTH.

BRINGING IN NEW PARTIES: INTERVENING.

§ 411. As the equitable theory of parties was adopted in the new procedure, we should naturally expect some provision for changing them, either by addition or diminution. In accordance with this expectation, the codes all contain sections prescribing rules more or less elaborate and explicit for the guidance of the courts in this respect. They follow two different types. The one is the mere statement in a statutory form of the doctrine as to bringing in new parties which had long prevailed in courts of equity, and to it is added a provision which permits a summary interpleader to be ordered by the court, upon motion, in certain specified cases, thus avoiding the delay and trouble of a formal interpleader suit. The New York code adopted this type, and it has been followed, sometimes with slight variations, but often with literal exactness, by most of the State codes and practice acts. The other type is entirely different. It discards entirely all the ancient notions; it goes far beyond the concessions made

Where an administrator in the course of his administration gave two bonds with different sureties, but the undertaking and the liabilities of the sureties being the same in each, it was held, in California, that all the sureties on both bonds could be sued in one action under the special provision of the code in that State. *Powell v. Powell*, 48 Cal. 284.

by the equity courts; it creates, under the title "Intervention" or "Intervening," a new division of the procedure. The fundamental notion is, that the person ultimately and really interested in the result of a litigation — the person who will be entitled to the final benefit of the recovery — may at any time, at any stage, intervene and be made a party, so that the whole possible controversy shall be ended in one action and by a single judgment. The States which have adopted this type to its fullest extent are Iowa and California, and their example has been partially followed in a few others.

§ 412. The provisions which follow the first form, as thus described, are all represented by the sections contained in the New York code: "The court may determine any controversy between the parties before it, where it can be done without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.

"And when in an action for the recovery of real or personal property a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

"A defendant against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in the court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order."¹

¹ New York, § 122; Wisconsin, ch. 122, §§ 22-24; Ohio, §§ 40-43; Missouri, ch. 110, art. 8, § 4; Minn. §§ 88-91, 116; Kansas, §§ 41-44; Ind. §§ 22, 23; Iowa, § 2561; California, §§ 386, 389; South Carolina, § 145; Nebraska, §§ 46-48; Florida, § 78; Kentucky, §§ 40, 41; North Carolina, § 65; Nevada, § 17; Oregon, §§ 39, 40; Dacotah, § 75; Idaho, § 17; Washington, §§ 12-14; Wyoming, §§ 45-47; Montana, §§ 17-19, 22. Several of these sections differ somewhat from the language of the New York code quoted in the text, but the differences are not material; they relate entirely to details of practice, and do not enlarge nor restrict the power conferred upon the courts.

§ 413. The second form of the statutory provision creating and regulating the subject of "Intervention" is as follows: "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, either before or after issue has been joined in the cause and before the trial commences. The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all costs of the intervention. The intervention shall be by petition, which must set forth the facts on which the intervention rests; and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings provided for in the code."¹

§ 414. The several clauses thus quoted at large relate to and establish three entirely different transactions in the conduct of an action. Not a little confusion has arisen from a neglect to keep these three subjects separate; the requisites of the one have been confounded with those of another, and thus mistakes have followed which a little care in examining the statute would have obviated. The three transactions referred to are the following: The first is provided for in all the codes, and is the brief enactment of a familiar rule in equity. It is the bringing in additional parties by the court when a complete determination of

¹ Code of Iowa (1878), §§ 2683-2685, slightly changed in phraseology from the former revisions of the statutes; California, Code of 1872, § 387: "Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding any thing adversely to both the plaintiff and the defendant, and is made

by complaint setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding, who may answer it as if it were an original complaint." This provision is somewhat changed from the original form in the statutes of 1854, ch. 84, §§ 71-74. It is substantially the same as that in Iowa, except that the intervenor must obtain leave of the court to file his complaint, while in Iowa he files his petition as a matter of course at his own election. The code of Washington Territory, §§ 18, 14, also contains a provision identical with that quoted above from the California statute.

the controversy cannot be had without their presence. This act plainly contemplates the fact that there are already parties before the court, defendants against whom the plaintiff has a cause of action, and is entitled to some relief. The enlarging the number of parties, under such circumstances, is clearly not the same thing as the commencing a new action because the plaintiff has failed to make out any cause of action against those whom he has already sued. By whose desire or on whose motion the additional parties shall be brought in, the section does not specify, but the terms are broad enough to include every case. In the majority of instances the plaintiff doubtless applies for the additional parties. Cases may and do arise in which the defendant, deeming it necessary to protect his own interests, makes the application. Finally, the court may, on its own motion, order in the persons whose presence it regards proper to a complete determination of the issues.

§ 415. The second of these transactions, in the progress of an action, is the bringing in and making a party to the suit a third person upon his own application,—or, in the very appropriate language of certain codes, the Intervening of a third person. In respect of this proceeding there is the marked difference between the two types of statutory provisions already spoken of. Most of the codes, following that of New York, have legislated upon the subject with great caution, and have merely given a certain extension to the familiar common-law practice of permitting a landlord to come in and defend an action of ejectment in the place of his tenant. The provision itself is very brief, and by its terms is confined to actions for the recovery of real or personal property. Beyond a doubt it embraces all equitable actions in which the remedy is the recovery of real or personal property, and is not restricted to the legal actions which correspond to the ancient ejectment and replevin. This short and simple clause is the only one which authorizes a third person to be made a party upon his own motion.

§ 416. Passing to the codes of Iowa and California, we see that Intervening rises at once into a proceeding of great importance. It may be resorted to in any and all actions, and at every stage in the action prior to the commencement of the trial. The intervenor may have an interest with the plaintiff, or with the defendant, or one special to himself and adverse to both of the

original parties. He does not ask the privilege of intervening, and obtain that privilege by an order; he intervenes as a matter of right, by filing and serving his petition in the same manner as though he was commencing an ordinary action, and his rights are passed upon and disposed of, together with those of the plaintiff and defendant, at the trial. It is plain that this is a judicial proceeding utterly unknown before in our ordinary courts, entirely unlike anything which had been customary in the common law or equity tribunals of England or the United States. Indeed, it was confessedly borrowed from the procedure established by the code of Louisiana.

§ 417. The third judicial transaction is the act of a defendant in procuring another person, not a party to the suit, to be substituted in place of himself as the party defendant, and himself to be thereby discharged from all liability in respect of the cause of action,—a special remedy long known in another form as an Interpleader. It should be carefully distinguished from each of the two former proceedings. Unlike the second, the stranger does not come in on his own motion; unlike the first, the application can only be made by a defendant. It is confined in its operation to three kinds of actions: those brought to recover money on a contract, either debt or damages, those brought to recover specific real property, and those brought to recover specific personal property. It is a substitute, by means of the summary mode of a motion and an order made thereon, for the ancient equitable action called the Bill of Interpleader. The consideration of this subject does not legitimately fall within the purposes of the present work; it does not involve the question who are and who are not proper parties, and there is no possible reason for its being discussed in this connection except that the statutory provision which regulates it is immediately associated with other clauses which do relate to parties. The two other judicial proceedings will now be examined with the aid of such judicial decisions as have explained their scope and effect.

§ 418. I. *Bringing in Additional Parties when necessary to a Complete Determination of the Controversy.* The issues between the original parties are to be determined, if that can be done without prejudice to the rights of others, or by saving the rights of others; if this be possible, the cause should be adjudicated as it was presented for decision. If a complete determination of

the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in. The force and effect of the whole provision depend upon the interpretation given to the clause, "when a complete determination of the controversy cannot be had without the presence of other parties." To use the language of an eminent judge which has been repeatedly approved by other courts in different States, this clearly means, "When there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. Doubtless there are many other cases in which a defendant may require other parties to be brought in, so that the judgment of the court in the action may protect him against the claims of such other parties; but this is his own privilege and he may waive it."¹ The distinction between the two conditions here spoken of is plain. In the first, the rights of the parties to the record are so bound up with those of others, that they cannot be ascertained and fixed without at the same time ascertaining and fixing the rights of the others also, and to do this, these others must of course be before the court. In the second, the issues between the parties to the record can be decided, but the relations of the defendant towards third persons are of such a nature that they will be affected by the decision, and it would be better and safer for him if these persons should be brought in so that his relations might be defined and protected in the single judgment. Such a proceeding is not, however, absolutely necessary to the determination of the controversy, and the defendant may waive his claim to the additional parties; it is, in fact, a privilege, not an absolute necessity. The circumstances and relations to which I allude were aptly described and the rule concerning them accurately stated by another judge: "There are cases in which it is proper and necessary to make a person defendant upon the ground of avoiding a multiplicity of suits. His rights may not be directly affected by the decree, but it may occur that if the plaintiff succeeds, the defendant will thereby acquire the right to call upon the party omitted or not joined either to reimburse him or reinstate him in the position lost by the plaintiff's success. And if so, the person conse-

¹ *McMahon v. Allen*, 12 How. Pr. 89, 45, per Woodruff J.; affirmed, 3 Abb. Pr. 89.

quently liable to be thus affected should be before the court that his liability may be adjudicated by one proceeding."¹

§ 419. If the case comes within the first described condition, that is, if there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory; the court must cause such persons to be brought in; it is not a matter of discretion but of absolute judicial duty.² The enforcement of this duty does not rest entirely upon the parties to the record. If they should neglect to raise the question, and to apply for the proper order, the court, upon its own motion, will supply the omission, and will either directly bring in the new parties or remand the cause in order that the plaintiff may bring them in.³ The fact that the necessary party is a non-resident of the State does not change the rule; he must still be brought in.⁴ The addition of the necessary party may be made at any stage of the cause.⁵ The action of the court may consist in requiring necessary defendants to be served with process, who had been named on the record, but not brought in by actual service or appearance.⁶

§ 420. This peremptory duty does not arise unless the conditions of the statute are fully met, and the court will not order in new parties defendant, against the will of the plaintiff, unless they are actually necessary in the sense already defined. Thus, in an action against the indorsers of a note, the plaintiff will not be compelled to bring in the maker as a codefendant.⁷ Nor is a new party to be ordered in merely for the purpose of settling matters between him and the defendant in which the plaintiff has no interest.⁸ The statute will not permit the plaintiff to add a new

¹ *Camp v. McGillicuddy*, 10 Iowa, 201, per Wright C. J., citing 1 Dan. Ch. Pr. 329; Story's Eq. Pl., § 178; *Wiser v. Blachly*, 1 Johns. Ch. 437. He adds: "Applying this rule, we think it proper to direct Moore to be made a party. If the plaintiff succeeds, M. will be liable to McG. either upon the covenants of his deed, or to correct the mistake by conveying to him the proper tract of land." See, also, *Forepaugh v. Appold*, 17 B. Mon. 632.

² *Davis v. The Mayor*, 2 Duer, 663;

³ *Duer*, 119; *Shaver v. Brainard*, 29 Barb.

⁴ *Sturtevant v. Brewer*, 9 Abb. Pr. 414;

⁵ *Mitchell v. O'Neale*, 4 Nev. 504; *Jones v.*

Vantress, 23 Ind. 533; *Johnson v. Chandler*, 15 B. Mon. 584, 589; *Johnston v. Neville*, 68 N. C. 177; *Whitted v. Nash*, 66 N. C. 590.

⁶ *Jones v. Vantress*, 23 Ind. 533; *Mitchell v. O'Neale*, 4 Nev. 504.

⁷ *Sturtevant v. Brewer*, 9 Abb. 414; s. c. on app., 4 Bosw. 628.

⁸ *Attorney-General v. The Mayor*, 3 Duer, 119.

⁹ *Powell v. Finch*, 5 Duer, 666.

¹⁰ *Sawyer v. Chambers*, 11 Abb. Pr. 110.

¹¹ *Frear v. Bryan*, 12 Ind. 343, 345.

Action by the assignee of a claim originally due from defendant to T. Defend-

defendant *without whose presence he could have no recovery* since he would have no cause of action. Such a proceeding would in effect be the commencing a new action, and the statutory provision assumes that in the pending action a right to obtain a recovery is set up as against the original defendants.¹ The plaintiff cannot be allowed, under the color of bringing in additional parties, to commence a new action when he would have failed entirely in the former one because he had not set up a good cause of action.

§ 421. I add a few examples of cases where parties have been brought in; they are designed merely as illustrations. Additional parties have been ordered in, in an action for the specific performance of a contract executed by three when two only were at first made defendants;² in an action for an accounting between two of a larger number of tenants in common of a mine, the complete adjustment of the account requiring that all the others should be added;³ in a similar action for an accounting between partners in a mining venture, and for a winding up of the concern;⁴ in an action upon a promissory note given for the purchase price of land in which the vendor and holder of the note sought to enforce his lien, the heirs of the deceased vendee, to whom the land had descended, were made defendants;⁵ in proceedings in aid of an execution the judgment debtor is a necessary party and will be brought in.⁶ Under the requirements of the Indiana code in reference to assignors of things in action when transferred without indorsement, if the assignor dies, the assignee must make his personal representative a defendant in the action, or must show that there is none.⁷ After new parties have been brought in, the pleadings must be made to show that

ant answered, (1) set-off against T. before notice; (2) payment to T. before the assignment. Upon defendant's motion, T. was made a coplaintiff, and was ordered to reply to the answer. On appeal, this order was reversed, the court stating the principle as in the text. 'T. was plainly not a necessary party; for if the facts alleged were true, they would have been a good defence against the original plaintiff. See Carr v. Collins, 27 Ind. 306. The court will not order in new defendants against the will of the plaintiff, unless their presence is necessary to a determi-

nation of the action. Fagan v. Barnes, 14 Fla. 53, 56, 58; Peck v. Ward, 3 Duer, 647.

¹ McMahon v. Allen, 12 How. Pr. 39; affirmed, 3 Abb. Pr. 89.

² Powell v. Finch, 5 Duer, 666. See Johnston v. Neville, 68 N. C. 177.

³ Mitchell v. O'Neale, 4 Nev. 504.

⁴ Settembre v. Putnam, 30 Cal. 490.

⁵ Jones v. Vantress, 28 Ind. 533.

⁶ Wall v. Whisler, 14 Ind. 228.

⁷ St. John v. Hardwick, 11 Ind. 251. See Dart v. McQuilty, 6 Ind. 391.

they are proper. When new defendants have been added on the application of the plaintiff, but the complaint, which stated no cause of action against them originally, had not been amended so as to supply this defect, it must be dismissed as against such defendants at the trial, and judgment thereon rendered in their favor.¹

§ 422. I cannot pass from this subject without adding certain remarks which are suggested by it, and which concern the practical administration of justice. The clause of the codes under examination is expressed in the most general terms, containing no exception nor limitation. Whenever a necessary party has been omitted by the pleader, the court has the power in any stage of the cause to remedy the defect by ordering him to be brought in, and the case to stand over until that is done. It is almost universally the fact that an objection for the nonjoinder of parties is really technical, that is, it does not go to the entire merits of the controversy. A cause of action is generally set forth against those, or in favor of those who are actually made parties; and the only error consists, not in stating the cause of action incorrectly, but in omitting some of the persons who are or rather *may be* beneficially or injuriously affected by it. If it be the true purpose and design of courts to administer justice between litigants, and to ascertain and enforce their rights and obligations, then it would seem to be the primary duty of the judges to decide every cause as far as possible upon the merits, and not upon some technical point which puts no question at rest, but simply renders it necessary to commence a new suit. Most emphatically does this seem to be their duty when the statute has provided a mode for accomplishing this result, and has even required in peremptory terms that this mode shall be pursued. Whenever the objection that there is a defect of necessary or proper parties is raised, it is always possible for the court in a summary manner to order them in, and to retain the cause for that purpose, and to decide the issues upon the merits, when the required addition has been effected. Not only is this course possible, but it is actually enjoined upon the courts by the codes. And yet this most beneficial provision of the statutes is to a great extent a dead letter. I believe there is hardly another section of the codes so well cal-

¹ *Smith v. Weage*, 21 Wisc. 440.

culated, if it were observed in its spirit and letter, to prevent the success of mere technicalities and to promote justice among suitors by procuring the decision of causes upon their merits. In marked contrast with the judicial practice which prevails to so great an extent in the States which have adopted the reformed American procedure, is a provision of the new system of practice recently approved by the British parliament, which declares that under no circumstances shall an action be dismissed, and the plaintiff turned out of court because he has committed an error in the selection of parties, either by uniting too many or too few, but that in every instance the court shall make the proper amendment, and by striking out or bringing in, shall shape the action into a proper form and condition for a decision of its issues upon the merits.¹ Although our codes do not contain such a provision in express terms, they do contain all that is necessary for the adoption and enforcement of the same general rule of procedure by the courts. The New York Court of Appeals has recently made a decision which is in close agreement with the foregoing views. It holds that if the plaintiff does not bring in the necessary parties after an objection properly made, the complaint may, in the discretion of the court, be dismissed, but without prejudice to a new action. An unqualified judgment of dismissal in such a case is erroneous. But the complaint should not be dismissed even without prejudice, and the plaintiff thus put to a new action, when the same end can be reached by allowing the cause to stand over in order that the plaintiff may add the necessary parties.²

§ 423. II. *Intervening, or the Coming in of Third Persons upon their own Application.* I proceed first to examine the force and effect of that provision which is found in most of the codes. In order that a person may avail himself of the permission given by it, and may make himself a party to an action, he need not be a necessary party.³ The granting of such an application lies in the discretion of the court, and it should not be permitted if the applicant is already a plaintiff in another suit in which he may obtain all the relief he asks.⁴ The application must be made before judgment, if made at all.⁵

¹ Supreme Court of Judicature Act; Schedule, § 9.

² *Sherman v. Parish*, 53 N. Y. 483, 490, 491.

³ *Carter v. Mills*, 30 Mo. 482.

⁴ *Scheidt v. Sturgis*, 10 Bosw. 606.

⁵ *Carswell v. Neville*, 12 How. Pr. 445.

§ 424. The occasions on which a third person may intervene in a pending action are very few. The scope of the provision is exceedingly limited; it has been said that its operation is confined to those cases in which a bill of interpleader would have been permitted, under the former practice, to accomplish the same end.¹ It is certain that the right to intervene can only be exercised in actions for the recovery of real or personal property.² It does not exist, therefore, in an action to recover money; as, for example, in a suit for wharfage, persons claiming to be owners of the wharf were not permitted to intervene;³ nor in an action in the nature of a creditor's suit, to reach a surplus of money in certain persons' hands;⁴ nor in an action to dissolve a partnership, and for an accounting;⁵ nor in any action on contract for the recovery of debt or damages.⁶ In an action to recover possession of goods on account of the vendee's fraud, third persons, claiming to have purchased them from him, cannot intervene.⁷ This ruling, however, is not based upon the nature of the suit itself, but upon the absence of any rights in the proposed intervenors.

§ 425. The following are some instances in which an intervention has been permitted. In an action for the partition of lands, any person having an interest in the land may intervene; but when the partition is among the heirs and devisees of a deceased owner, a judgment creditor of such decedent has no such interest nor right.⁸ In an action to recover land, a landlord may intervene when his tenant only has been made a defendant;⁹ and in an action to recover the possession of goods taken on execution, the execution creditor may intervene.¹⁰ In a suit to compel the specific performance of a contract to convey land against the vendor alone, a third person alleging title in himself to the same land from the same vendor, prior and paramount to that of the plaintiff, was allowed to intervene and to defend. It was said that the intervenor need not be a necessary party, but should

¹ *Hornby v. Gordon*, 9 Bosw. 656.

⁷ *Hornby v. Gordon*, 9 Bosw. 656.

² *Kelsey v. Murray*, 28 How. Pr. 243; 18 Abb. Pr. 294; *Tallman v. Hollister*, 9 How. Pr. 508; *Judd v. Young*, 7 How. Pr. 79.

⁸ *Waring v. Waring*, 8 Abb. Pr. 246. See *Baker v. Riley*, 16 Ind. 479, which holds that a person claiming title to the whole land should not be permitted to intervene in a partition suit.

³ *Kelsey v. Murray*, 18 Abb. Pr. 294.

⁴ *Tallman v. Hollister*, 9 How. Pr. 508.

⁵ *Dayton v. Wilkes*, 5 Bosw. 655.

⁶ *Judd v. Young*, 7 How. Pr. 79.

⁹ *Godfrey v. Townsend*, 8 How. Pr. 398.

¹⁰ *Conklin v. Bishop*, 3 Duer, 646.

be permitted to come in if the judgment as between the original parties would cast a cloud upon his own title.¹ Under the former practice, no intervention was ever permitted in actions at law, except that in ejectment the landlord might make himself a defendant in place of his tenant.²

§ 426. *The Iowa and California System of Intervening.* The peculiarities of this proceeding, the extent of its innovations upon all prior methods, and its usefulness in procuring controversies to be decided on their merits in a single action, will be best shown by detailing the facts of one or two cases in which it has been resorted to. An action in the usual form was brought by A., the payee of two promissory notes made by B., in which B. made no defence. At this stage of the cause C. filed a petition of intervention, alleging the following facts: Before the giving of these notes, B. was indebted in the amount thereof to one D., and was not indebted at all to the plaintiff; that the plaintiff A. caused B. to execute and deliver to him these notes, and the consideration thereof was B.'s said indebtedness to D.; that A. had no authority to take these notes in his own name, but they should have been given in the name of D.; that D. is dead, and the intervenor C. is his administrator; that the notes belong really to the estate of D., and the plaintiff has no interest in them, except that the legal title is in him. The petition prayed that the intervenor might become a party plaintiff, and that judgment might be rendered in his favor as administrator for the amount of the notes against B., the maker thereof. To this petition the original plaintiff A. demurred, and the Supreme Court of Iowa held that the case was a proper one, within the system established in that State, for an intervention, and that upon the facts alleged in the petition the intervenor was entitled to judgment.³ In another case, A., claiming to be assignee of a note

¹ Carter v. Mills, 30 Mo. 432. In Summers v. Hutson, 48 Ind. 228, a third person was permitted to intervene in an action upon a promissory note, to make himself a defendant, to set up in his answer facts showing that he was the real party in interest, and the equitable owner of the note, and the one solely entitled to its proceeds, and to recover thereon as against the maker, who was the original defendant. This is certainly identical

with the system which prevails in Iowa and California. This intervention was permitted under the general provision of § 18, that "any person may be made a defendant who has an interest in the controversy adverse to the plaintiff."

² Hornby v. Gordon, 9 Bosw. 656; Godfrey v. Townsend, 8 How. Pr. 398.

³ Taylor v. Adair, 22 Iowa, 279. See Summers v. Hutson, 48 Ind. 228.

and mortgage executed to B. as the payee and mortgagee, commenced an ordinary action for a foreclosure. Thereupon C. filed a petition of intervention as administrator of B., the mortgagee, in which he denied that the note and mortgage had ever been assigned to A., denied that the latter had any interest or right therein, and averred that they were assets of the estate of his intestate B., and prayed for judgment in his own favor of foreclosure and sale against the mortgagor and other defendants. Upon a demurrer to this petition, the Supreme Court of California held that the intervention was entirely within the intent and the letter of the statute, and that the intervenor should have judgment.¹ Again, in an action commenced to foreclose a mortgage given (together with a note) by a corporation which had become insolvent, certain judgment creditors of the company intervened, alleging fraud in the execution of the note and mortgage by the defendant, and that they were void as against its creditors; and praying that they might be adjudged void, and the action to foreclose be dismissed. The intervention of these judgment creditors was sustained, but it was held, at the same time, that simple contract creditors had no foundation for an intervention, since they could not dispute the mortgage.²

§ 427. Such being some illustrative examples of the circumstances and facts to which this free and enlarged system of intervening has been applied, it remains to state the principles which guide the courts in its application, and which are embodied in the system itself. In making this explanation, I shall use, as far as possible, the very language of the courts. In the first of the three cases cited in the last paragraph—*Taylor v. Adair*—the Supreme Court of Iowa said: "To the lawyer not thoroughly conversant with the sweeping and radical changes in procedure and practice made by the Revision, the proposition that such an intervention as that sought in the present instance is allowable, would be not a little startling." The general notions which lie

¹ *Stich v. Dickinson*, 38 Cal. 608.

² *Horn v. Volcano Water Co.*, 13 Cal. 62. In proceedings to collect an execution against R., the plaintiff garnished one Clark as a debtor of R. Clark admitted a debt of \$300, but R. denied that it was due to himself, and alleged that it was due to his wife. On trial before a justice of the peace, plaintiff had a judgment.

R. appealed to the circuit court, where the whole matter was re-tried. Pending the second trial, two other persons, W. & C., intervened, alleging that R. and wife had assigned this debt to them, and they recovered judgment upon the trial. The plaintiff appealing, this intervention was held proper under § 3237 of the Revision. *Daniels v. Clark*, 38 Iowa, 556.

at the foundation of the new system of procedure are sketched, and are shown to be in harmony with the thought which finds an expression in the provision respecting intervention. "A design to avoid needless multiplicity of actions is everywhere apparent in the present system of procedure. Consonant with the other provisions of this system are those governing and regulating the rights of third parties to intervene in a pending action. Applying the section of the code (§ 2683) to the case in hand, we first inquire whether C., as the administrator of D., has 'an interest in the matter in litigation.' What was the matter in litigation? Clearly the debt which B. owed. We say the debt rather than the note, for the debt is the substance of which the note is simply a memorandum or visible evidence. Now this debt is alleged, and on the record admitted, to be owing by B. to D., and not to the plaintiff. If D. or his administrator had possession of the notes, though they are made payable to the plaintiff A., he might, on showing his ownership, sue thereon in his own name.¹ So, although the plaintiff A. might sue in his own name on the notes, they being made payable to him, yet if they were in reality the property of D., the maker might avail himself of any defence he might have against D. These considerations are advanced to illustrate how thoroughly the law penetrates beyond names and forms and externals into the very substance and kernel. Now, if the plaintiff succeeds, he recovers that which, on the assumption of the truth of the petition of intervention, belonged to another; that which D. or his representative may sue him for and compel him to pay. He may be insolvent. He may, if he recover the judgment, assign it. Why should the real owner of the debt not have the privilege of coming into court, and, on establishing as against the plaintiff the right to the debt, directly recover it in his own name? This avoids multiplicity of actions, consequent delay, and augmented costs. It may, as above suggested, be the only protection against the insolvency or fraud of the plaintiff. We are not prepared to admit the truth of the proposition advanced in support of the demurrer, that the interest of D. is of such a nature that it could be asserted only in a court of equity. Nor are we prepared to admit the further proposition that in a legal action an intervenor's

¹ Cottle v. Cole, 20 Iowa, 481.

interest in the matter in litigation must be a legal interest, to entitle him to the benefit of the statute. We conclude by announcing it as the opinion of the court that this is a case in which the applicant has shown that he has 'an interest in the matter in litigation against both parties,' — a case in which he demands something adversely to both plaintiff and defendant. This interest is adverse to the plaintiff, as he claims against *him* the amount of the note and debt. His interest is adverse to the defendant, since he claims to recover against *him* a judgment for the amount of the note."¹

§ 428. The same principles of interpretation have been adopted by the Supreme Court of California. In the case secondly cited — *Stich v. Dickinson* — it said: "The intervention in this case comes within the last category of either [that is, where his interest is adverse to both of the original parties]. The intervenor certainly has no interest in common either with the plaintiff or the defendant; but we think he has an interest in the matter in litigation adverse to both within the meaning of the section referred to. He has an interest against the pretension of the plaintiff to be owner of the note and mortgage, and to have a decree of foreclosure for his benefit, and against the defendant for the collection of the debt. The subject-matter of the litigation is the note and mortgage, and the right of the plaintiff to have a decree of foreclosure and sale. The intervenor claims as against the plaintiff that *he* and not the plaintiff is entitled to the decree of foreclosure; and as against the defendant, that the mortgage debt is due and unpaid, and that he is entitled to a foreclosure. In this case the intervenor claims the demand in suit, viz., the note and mortgage, and we can perceive no reason founded on the policy of the law, which should preclude the settlement of the whole controversy in one action."²

§ 429. In *Howe v. Volcano Water Co.*, the same court said: "The petition of the creditor R. does not disclose any right on his part to intervene; it shows that he was a simple contract creditor, holding obligations against the company, but it does not show that any portion of them are secured by any lien on the

¹ *Taylor v. Adair*, 22 Iowa, 279, 281, per Dillon J. Judge Dillon's summary of the leading and essential features contained in the new system of procedure is very accurate and complete, and his sim-

ple enumeration is an unanswerable argument in favor of the reform.

² *Stich v. Dickinson*, 38 Cal. 608, per Crockett J.

mortgaged premises. His intervention is only an attempt of one creditor to prevent another creditor from obtaining judgment against the common debtor, — a proceeding which can find no support either in principle or authority. The interest mentioned in the statute which entitles a person to intervene in a suit between other parties, *must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.* The provisions of our statute are taken substantially from the code of procedure of Louisiana, which declares that 'in order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit;' and the Supreme Court of that State, in passing upon the term 'interest,' thus used, held this language: 'This we suppose must be a direct interest by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties; otherwise the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs, that a defendant against whom a previous action was under prosecution might not have property sufficient to discharge all his debts. For as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors down to the last would have an indirect interest in defeating the action of the first.'¹ To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or a claim to or lien upon the property or some part thereof which is the subject of litigation. No such claim or lien is asserted in the petition of R., and his right to intervene in consequence thereof fails.² The petition of S. and

¹ Gasquet v. Johnson, 1 Louis. R. 481.

² Brown v. Saul, 4 Martin, n. s. 484.

I have collected in this note the important Louisiana cases on the subject of intervention. Brown v. Saul, 4 Martin, n. s. 484; Gasquet v. Johnson, 1 Louis. 425, 481. In an action by a creditor against his debtor with or without an attachment, other creditors cannot intervene on the mere ground of the debtor's insolvency and the consequent insufficiency of his

property to pay all his debts; they have not the interest required by the statute. Norris's Heirs v. Ogden's Executors, 11 Martin, 455, 460; Kenner's Syndic v. Holliday, 19 Louis. 154, 165; Ardry's Wife v. Ardry, 16 Louis. 264, 268; Shields v. Perry, 16 Louis. 463, 465; McMillen v. Gibson, 10 Louis. 517, 518; Raspillier v. Brownson, 7 Louis. 231, 232; Fearing v. Ball's Executors, 6 Louis. 685, 690; Emerson v. Fox, 3 Louis. 178, 182. An

others stands upon a different footing. It shows that they were judgment creditors having liens by their several judgments upon the mortgaged premises at the time of the institution of the suit. As such, they were subsequent incumbrancers and necessary parties to a complete adjustment of all the interests in the mortgaged premises, though not indispensable parties to a decree determining the rights of the other parties as between themselves. For such adjustment the court would have been justified in ordering them to be brought in, either upon their own petition, as in the present case, or by an amendment to the complaint."¹

§ 480. The doctrine thus stated by Mr. Justice Field is clearly the correct interpretation of the provisions contained in the Cali-

intervenor cannot assail the sufficiency of the plaintiff's attachment proceedings. *Curtis v. Curtis*, 8 Louis. 518, 515. In partition between co-owners, a third person claiming to own the entire property in opposition to all the other parties cannot intervene to establish his title. *Field v. Mathison*, 8 Rob. 88; *Tutorship of Hackett*, 4 Rob. 290, 296; *Harrod v. Burgess*, 5 Rob. 449; *Whittemore v. Watts*, 7 Rob. 10; *West v. His Creditors*, 8 Rob. 128; *Jones v. Jenkins*, 9 Rob. 180; *Succession of Baum*, 11 Rob. 814, 822; *Hazard v. Agricultural Bank*, 11 Rob. 326, 336. When property of the defendant is attached or otherwise seized in the suit, third persons claiming to own it, or to have a prior lien on it, may intervene. See *Yale v. Hoopes*, 12 La. An. 460; *Danjean v. Blacketer*, 13 La. An. 595; *Gaines v. Page*, 15 La. An. 108; *White v. Hawkins*, 16 La. An. 25; *Yale v. Hoopes*, 16 La. An. 311; *Letchford v. Jacobs*, 17 La. An. 79; *Ledda v. Maumus*, 17 La. An. 314; *Field v. Harrison*, 20 La. An. 411; *Fleming v. Shields*, 21 La. An. 118; *Beckwith v. Peirce*, 22 La. An. 67; *Michel v. Sheriff, &c.*, 23 La. An. 53. But such intervenor cannot dispute the regularity of the attachment proceedings. *Yeatman v. Estill*, 3 La. An. 222; *Fleming v. Shields*, 21 La. An. 118. And when the attached property has been released on a bond, a third person cannot intervene to claim it. *Wright v. White*, 14 La. An. 500; *Burbank*

v. Taylor, 23 La. An. 751. In actions to establish title, and to recover possession of land or chattels, third persons claiming to be owners as against both plaintiff and defendant may intervene. This is a very common form. See *Haydel v. Bateman*, 2 La. An. 755; *Phelps v. Hughes*, 1 La. An. 320, 321; *Gibson v. Foster*, 2 La. An. 503, 504; *Baldree v. Davenport*, 7 La. An. 587; *Levy v. Weber*, 8 La. An. 439; *McCoy v. Sanson*, 18 La. An. 455; *Brown v. Brown*, 22 La. An. 475. In actions on contracts, persons claiming a total or partial interest in the recovery; and, in actions to reach a fund, persons claiming a prior lien on or interest in the same property. *O'Brien v. Police Jury*, 2 La. An. 355; *Dubroca v. Her Husband*, 3 La. An. 331; *Moran v. Le Blanc*, 6 La. An. 113; *Bedell's Heirs v. Hayes*, 21 La. An. 643; *Walker v. Simon*, 21 La. An. 669; *Taylor v. Boedicker*, 22 La. An. 79. The following are miscellaneous cases: *Erwin v. Lowry*, 1 La. An. 276, 278; *Devall v. Boatner*, 2 La. An. 271; *Thompson v. Myline*, 4 La. An. 206; ib. 212; *Union Bank v. Bowman*, 15 La. An. 271; *Clapp v. Phelps*, 19 La. An. 461; *Cobb v. Depue*, 22 La. An. 244; *Merritt v. Merle*, ib. 257; *State v. Dubuclet*, ib. 365; *Aleix v. Derbigny*, ib. 385; *Cleveland v. Comstock*, ib. 597; *State v. Graham*, 23 La. An. 402; *Moreau v. Moreau*, 25 La. An. 214.

¹ *Horn v. Volcano Water Co.* 13 Cal. 62, 69, per Field J.

fornia and the Iowa codes, and the opinion of Mr. Justice Dillon is in complete harmony with it. The cases cited above all fall within this doctrine. In each the intervenors had a direct interest, either in prosecuting the action and obtaining the benefit of the recovery, or in defending the action and entirely defeating the recovery. If the intervenor claims to be the only one entitled to the relief, if he asserts that the ultimate cause of action is vested in him and not in the original plaintiff, then his interest is adverse to both of the parties. The doctrine may be expressed in the following manner: The intervenor's interest must be such, that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least. His interest may be either legal or equitable. If equitable, it must be of such a character as would be the foundation for a recovery or for a defence, as the case might be, in an independent action in which he was an original party. As the new system permits legal and equitable causes of action or defences to be united by those who are made the parties to an ordinary suit, for the same reason either or both may be relied upon by an intervenor. In short, the same rules govern his rights which govern those who originally sue or defend. The proceeding by intervention is not an anomalous one, differing from other judicial controversies, after it has been once commenced. It is, in fact, the grafting of one action upon another, and the trying of the combined issues at one trial, and the determining them by one judgment. In this aspect of the proceeding, it is both plain and reasonable that the intervenor should not be required to apply for permission to come in. He brings himself into court, and becomes a litigant party by filing and serving his petition, which is answered by the adversary parties—plaintiff or defendant, or both—in the same manner as though it was the pleading of a plaintiff: the issues are thus framed,—issues upon the plaintiff's petition and the intervenor's petition,—and the trial of the whole is had at one hearing. If the intervenor fails on this trial, a judgment for costs is of course rendered against him; if he succeeds, a judg-

ment is given in his favor according to the facts and circumstances of the case.¹

§ 431. This is certainly a great innovation upon the procedure which has hitherto prevailed in courts of law and of equity. It is, however, a method based upon the very principles which lie at the foundation of the entire reformed American system. The only possible objection is the multiplication of issues to be decided in the one cause, and the confusion alleged to result therefrom. This objection is not real: it is the stock argument which was

¹ These remarks apply in their full extent only to the Iowa system, since by the last revision of the California code an intervenor must obtain leave of the court to file his complaint. Where an intervention is adverse to both plaintiff and defendant, the issues raised by it must be tried and decided, whatever disposition may be made of the issues between the original parties. If the plaintiff is non-suited on the trial, the intervention is not thereby dismissed, but its trial must go on until a decision in it is reached. *Poehlman v. Kennedy*, 48 Cal. 201. The following cases show the circumstances under which the doctrine has been applied by the courts of California. A third person, to whom the cause of action has been transferred *pendente lite*, or who is directly interested in the subject-matter, may intervene before or after the issue is joined. *Brooks v. Hager*, 5 Cal. 281, 282. In an action to foreclose a mortgage given on a homestead, the wife of the mortgagor may intervene. *Sargent v. Wilson*, 5 Cal. 504, 507; *Moss v. Warner*, 10 Cal. 296, 297. When the State was the plaintiff seeking to recover moneys belonging to it, a third person intervened, and set up a claim to the same money, growing out of the transaction which was the foundation of the suit; but it was held that the State could not be sued in any form, although it was conceded that the intervention would have been proper between private persons. *People v. Talmage*, 6 Cal. 256, 258. An intervention is proper by a person having a claim or lien upon the fund which is the subject of the action. *County of Yuba v. Adams & Co.*, 7 Cal. 85. In an attachment suit, judgment creditors of the defendant may intervene, and object

to the attachment, and have it set aside if void as against them. *Davis v. Eppinger*, 18 Cal. 378, 380; and see *Dixey v. Pollock*, 8 Cal. 670. And, in such a suit, a subsequent attaching creditor may intervene, and show that the first attachment was wrongly issued, because there was, in fact, no debt due from the defendant to the plaintiff therein, and may have its lien postponed to that of his own attachment. *Speyer v. Ihmels*, 21 Cal. 280, 287; *Coghill v. Marks*, 29 Cal. 678. In an action against a sheriff for wrongfully seizing the plaintiff's property on execution against another, the person who indemnified the sheriff may intervene, and make himself a party on the record, and defend in the place of the defendant, — the sheriff. *Dutil v. Pacheco*, 21 Cal. 438, 442, per Norton J. If an action is brought to foreclose a mortgage which is barred by the statute of limitations, a subsequent purchaser or incumbrancer of the land may intervene, and set up the statute as a defence. *Coester v. Brown*, 28 Cal. 142, 143. An action being brought by the assignee of a thing in action, the assignment of which was absolute on its face, the assignor intervened, alleged that he owned three-fourths of the debt, and prayed judgment in his own favor for that amount. The intervention was sustained, and the intervenor had judgment for three-fourths, and the plaintiff for one-fourth. *Gradwohl v. Harris*, 29 Cal. 150, 154. When the court below has granted an application to intervene, although after the trial and decision, its act is a judicial one, and cannot be reviewed by mandamus. *People v. Sexton*, 37 Cal. 532, 534.

constantly urged in favor of retaining the common-law system of special pleading, and was repudiated when the codes were adopted by the American States, and has been at last utterly repudiated in England. Complicated issues of fact are daily tried by juries, and complicated equities are easily adjusted by courts. The description which I have here given of the enlarged power of intervention admitted by the codes of California and of Iowa, may, by introducing its methods to the profession of other States, procure its general adoption wherever the new procedure is established. Courts and legislatures of the several States may well borrow the improvements which have been made in other commonwealths; and thus, by a comparison of methods, the common system may become perfected and unified.

CHAPTER THIRD.

THE AFFIRMATIVE SUBJECT-MATTER OF THE ACTION: THE
FORMAL STATEMENT OF THE CAUSE OF ACTION BY THE
PLAINTIFF.

SECTION FIRST.

THE STATUTORY PROVISIONS.

§ 432. I HERE collect all the provisions of the various codes which relate in a general manner to the plaintiff's complaint or petition, and which contain the rules applicable to the theory of pleading as a whole: those which prescribe the mode of alleging certain particular classes of facts, or regulate the joinder of causes of action, or define the nature and uses of the reply, will be quoted in subsequent portions of the chapter, in immediate connection with the several subjects to which they refer. The important clauses which announce the fundamental and essential principles and doctrines of the reformed system in regard to all pleadings, and which determine the form and substance of the one by which the plaintiff sets forth the grounds of his claim for judicial relief, are nearly the same in the different State codes. With the few variations in the language, which will be pointed out, there is no substantial difference; and the system of pleading, as found in the statute, is absolutely the same wherever the reform prevails. The following are all the provisions which it is necessary to quote in order to exhibit the simple and natural methods introduced by the new procedure.

§ 433. "All the forms [the rules, Ohio, Nebraska, Kansas] of pleading heretofore existing [in actions at law, Oregon] are abolished; and hereafter the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act."¹ "The first

¹ New York, § 140; Wisconsin, ch. § 116; California, § 421; Florida, § 91; 126, § 1; Ohio, § 83; Missouri, art. 5, Oregon, § 62; Dacotah, § 92; North § 1; Minnesota, § 76; Kansas, § 86; Nebraska, § 91; South Carolina, § 163; braska, § 90; Indiana, § 47; Kentucky, In Indiana, the phrase "inconsistent with

pleading on the part of the plaintiff is the complaint [petition]."¹ "The only pleadings allowed are, 1, the petition [complaint] by the plaintiff; 2, the answer or demurrer by the defendant; 3, the demurrer or reply by the plaintiff; 4, the demurrer to the reply by the defendant."² "The complaint [petition] shall contain, 1, the title of the cause specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, — plaintiff and defendant; 2, a plain and concise statement of the facts constituting a cause of action without unnecessary repetition; 3, a demand of the relief to which the plaintiff supposes himself entitled. If a recovery of money be demanded, the amount thereof shall be stated."³ "The defendant may de-

the provisions of this act" is inserted between "existing" and "are abolished." The corresponding provision of the Iowa code is more detailed: "§ 2644. All technical forms of action or pleading, all common counts and general issues, and all fictions, are abolished; and hereafter the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this code."

¹ New York, § 141; Wisconsin, ch. 126, § 2; Missouri, art. 5, § 3; Minnesota, § 78; Indiana, § 49; California, § 425; Florida, § 92; Oregon, § 64; Dacotah, § 94; North Carolina, § 92; South Carolina, § 164.

² Ohio, § 84; Minnesota, § 77; Kansas, § 86; Nebraska, § 91; Iowa, § 2645; Indiana, § 48; California, § 422; Oregon, § 63; Dacotah, § 93; Kentucky, § 117. In Ohio, the following is added: "Cross-petition. Any defendant who is properly made a defendant may claim in his answer relief touching the matters in question in the petition, against the plaintiff or against other defendants in the same action." So in Kentucky the defendant may make his answer a cross-petition against a codefendant or other person.

³ New York, § 142 (compl't.); Wisconsin, ch. 126, § 3 (compl't.); Ohio, § 85 (pet'n.); Kansas, § 87 (pet'n.); Nebraska, § 92 (pet'n.); Missouri, art. 5, § 3 (pet'n.); Minnesota, § 79 (compl't.); Indiana, § 49 (compl't.); California, § 426 (compl't.); Florida, § 98 (compl't.); Oregon, § 65 (compl't.); Dacotah, § 95 (com-

pl't.); Kentucky, § 118 (pet'n.); North Carolina, § 98 (compl't.); South Carolina, § 165 (compl't.). In Ohio, Kansas, and Nebraska, the second subdivision reads, "A statement of the facts constituting, &c., in ordinary and concise language;" in Indiana it is the same, with the following addition, "without repetition and in such a manner as to enable a person of common understanding to know what is intended." The corresponding section of the Iowa code is special: "§ 2646. The petition must contain, 1, the name of the court and county in which the action is brought; 2, the names of the parties to the action, plaintiff and defendant, followed by the word 'petition' if the proceedings are ordinary, and by the words 'petition in equity' if the proceedings are equitable; 3, a statement of the facts constituting the plaintiff's cause of action; 4, a demand of the relief to which the plaintiff considers himself entitled, and, if a recovery of money be demanded, the amount thereof shall be stated; 5, when the petition contains more than one cause of action, each must be stated wholly in a division or count by itself, and must be sufficient in itself; but one prayer for relief may include a sum based on all the counts looking to a money remedy; 6, in a petition by equitable proceedings, each division shall also be separated into paragraphs, numbered as such, for convenient reference; and each paragraph shall contain, as near as may be convenient, a complete and distinct statement."

mur to the complaint [petition] when it shall appear on the face thereof, either, 1, that the court has no jurisdiction of the person of the defendant or the subject of the action; or, 2, that the plaintiff has not legal capacity to sue; or, 3, that there is another action pending between the same parties for the same cause; or, 4, that there is a defect [or misjoinder, California] of parties plaintiff or defendant; or, 5, that several causes of action have been improperly united; or, 6, that the complaint [petition] does not state facts sufficient to constitute a cause of action.”¹ “When any of the matters enumerated [in the last section] do not appear upon the face of the complaint [petition], the objection may be taken by answer. If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint [petition] does not state facts sufficient to constitute a cause of action.”²

§ 434. The foregoing provisions describe the complaint or petition: the following clauses—some of which, however, are not found in all the codes—comprise the general rules applicable to all pleadings, which regulate their form and contents, and determine their sufficiency,—the general principles, in short, which characterize the system of pleading provided for by the reformed procedure: “In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed

¹ New York, § 144; Wisconsin, ch. 125, § 5; Ohio, § 87; Minnesota, § 80; Kansas, § 89; Nebraska, § 94; Indiana, § 50; Missouri, art. 5, § 6 (adding, “or, 7, that a party, plaintiff or defendant, is not a necessary party to a complete determination of the action”); California, § 480 (adding, “7, that the complaint is ambiguous, unintelligible, or uncertain”); Oregon, § 66 (adding, “or, 7, that the action has not been commenced within the time limited in the code”); Kentucky, § 120; Florida, § 95; Dacotah, § 97; North Carolina, § 95; South Carolina, § 167. In Iowa, the first four subdivisions of § 2648 are the same as those given in the text, and the section then proceeds: “or, 5, that the facts stated in the petition do not entitle the plaintiff to the relief demanded; or, 6, that the petition on the face thereof shows that the claim is barred by the statute of limitations; or fails to

show it to be in writing when it should be so evidenced; or, if founded on an account or writing as evidence of indebtedness, and neither such account or writing, or a copy thereof, is incorporated with, or attached to, such pleading, or a sufficient reason stated for not doing so.”

² New York, §§ 147, 148; Wisconsin, ch. 125, §§ 8, 9; Ohio, § 89; Missouri, art. 5, § 10; Minnesota, §§ 77, 78; Kansas, § 91; Nebraska, § 96; Indiana, § 54; California, §§ 488, 484; Florida, §§ 98, 99; Oregon, §§ 69, 70; Dacotah, §§ 100, 101; North Carolina, §§ 98, 99; South Carolina, §§ 170, 171. The Iowa code, § 2650, after the same provision as that in the text, adds, “If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment before judgment is entered.”

with a view to substantial justice between the parties.”¹ “If irrelevant or redundant matter be inserted in a pleading, it may be struck out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.”² “All fictions in pleading are abolished;”³ “A material allegation in a pleading is one essential to the claim or defence, which could not be struck from the pleading without leaving it insufficient. Neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading.”⁴ The following special provision, which is found only in a portion of the codes, and is not impliedly contained in the general principles common to them all, is quoted because of its practical importance as a rule of procedure in those States whose legislation has adopted it: “If the action, counterclaim, or set-off, be founded on an account, or on a note, bill, or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be shown in the pleading.”⁵

§ 435. Ample provision is made for the amendment of pleadings, either at the trial itself, or at any other time in the progress of the cause. The following sections are contained in all the codes, with some unimportant verbal variations in a few

¹ New York, § 159; Wisconsin, ch. 125, § 28; Ohio, § 114; Missouri, art. 5, § 87; Minnesota, § 98; Kansas, § 115; Nebraska, § 121; Indiana, § 90; California, § 452; Florida, § 109; Oregon, § 88; Dacotah, § 112; North Carolina, § 119; South Carolina, § 182.

² New York, § 160; Wisconsin, ch. 125, § 24; Ohio, § 118; Missouri, art. 5, § 20; Minnesota, § 94; Kansas, § 119; Nebraska, § 125; Indiana, § 90; Iowa, §§ 2719, 2720 (somewhat altered); California, § 463 (altered verbally); Florida, § 110; Oregon, § 84; Dacotah, § 113; North Carolina, § 120; South Carolina, § 183.

³ Ohio, § 115; Kansas, § 116; Indiana, § 92; Missouri, art. 5, § 18, — “No allegation shall be made in any pleading which the law does not require to be proved, and only the substantial facts necessary to

constitute the cause of action or defence shall be stated.”

⁴ Ohio, §§ 128, 129; Missouri, art. 5, § 39 (only the last clause); Kansas, §§ 129, 130; Nebraska, §§ 135, 136; Indiana, § 88 (only the last clause); California, § 463 (first clause only); Oregon, § 93 (the first clause only).

⁵ Ohio, § 117; Kansas, § 118; Nebraska, § 124; Missouri, art. 5, § 51, the instrument itself must be filed with the pleading; Indiana, § 78, — when any pleading is founded on a written instrument or account, the original, or a copy, must be filed with the pleading. In Iowa, the section prescribing the grounds of demurrer requires such a writing, or a copy thereof, to be incorporated with, or attached to, the pleading; § 2648, subd. 6. See *supra*, § 438, note.

of them: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled [shall actually mislead] the adverse party to his prejudice in maintaining his action or defence upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just."¹ "When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."² "Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof."³ Any pleading may be amended once by the party filing or serving it, as a matter of course, and without costs, and without prejudice to proceedings already had: such amendment must be made within specified times, which differ in the various codes; but will not be permitted if it appear to be merely for purposes of delay.⁴ In addition to this privilege of voluntary amendment accorded to the parties, the court itself may, on motion, amend a pleading, or permit it to be amended, at any stage of the cause, before and in most of the States, after the judgment, on such terms as may be proper. This authority is conferred in very broad terms, with the limitation, however, that the cause of action or defence shall not be substantially changed.⁵ Finally, all the codes contain the

¹ New York, § 169; Wisconsin, ch. 125, § 35; Ohio, § 181; Missouri, art. 8, § 1; Minnesota, § 105; Kansas, § 188; Nebraska, § 188; Iowa, § 2686; Indiana, § 94; California, § 469; Florida, § 119; Oregon, § 94; Dacotah, § 122; North Carolina, § 128; South Carolina, § 192.

² New York, § 170; Wisconsin, ch. 125, § 36; Ohio, § 182; Missouri, art. 8, § 2; Minnesota, § 106; Kansas, § 184; Nebraska, § 189; Iowa, § 2687; Indiana, § 95; California, § 470; Florida, § 120; Oregon, § 95; Dacota, § 123; North Carolina, § 129; South Carolina, § 193.

³ New York, § 171; Wisconsin, ch. 125, § 37; Minnesota, § 107; Ohio, § 183; Kansas, § 185; Nebraska, § 140; Iowa, § 2688; Indiana, § 96; California, § 471;

Florida, § 121; Oregon, § 96; Dacotah, § 124; North Carolina, § 130; South Carolina, § 194.

⁴ New York, § 172; Wisconsin, ch. 125, § 38; Ohio, § 184; Missouri, art. 8, § 7; Minnesota, § 108; Kansas, § 186; Nebraska, § 141; Indiana, § 97; Iowa, § 2647; California, § 472; Florida, § 122; Oregon, § 97; Dacotah, § 125; North Carolina, § 131; South Carolina, § 195. These provisions are substantially the same, except in respect to the time within which the amendment can be made: they all permit one such amendment by the party of his own pleading, as a matter of course.

⁵ New York, § 173; Wisconsin, ch. 125, § 41; Ohio, § 187; Missouri, art. 8,

following most righteous provision, which, as appears by their reported decisions, is treated by the courts of some States as though it were a legislative command binding upon them: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."¹

§ 436. In the important discussions based upon the foregoing statutory provisions, which will form the substance of the present chapter, the natural and scientific order of treatment would undoubtedly lead me first to develop the general and essential principles upon which the whole reformed theory of pleading is based, and afterwards to apply these principles in determining the rules that regulate the matter and form of the plaintiff's complaint or petition. Scientific method must, however, be sometimes abandoned from considerations of convenience and expediency; and such a course seems to be proper in this instance. In attempting to obtain a correct notion of the essential principles and doctrines of the new system, it will be necessary to fix the

§§ 8, 6; Minnesota, § 109; Nebraska, § 144; Kansas, § 139; Indiana, § 99 (with verbal changes); Iowa, § 2689; California, § 478; Florida, § 123; Oregon, § 99; Dacotah, § 126; North Carolina, § 132; South Carolina, § 196. The following is the clause as found in all the codes substantially, and exactly in most of them: The court may at any time "amend any pleading or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of any party, or a mistake in any other respect; or by inserting allegations material to the case; or, when the amendment does not substantially change the claim or defence, by conforming the pleading or proceeding to the facts proved."

¹ New York, § 176; Wisconsin, ch. 125, § 44; Ohio, § 168; Missouri, art. 8, § 5; Minnesota, § 112; Nebraska, § 145; Kansas, § 140; Indiana, § 101; Iowa, § 2690; California, § 475; Florida, § 126; Oregon, § 104; North Carolina, § 135; South Carolina, § 199. The foregoing are all the general provisions relating to the plaintiff's pleading, or to the theory of pleading as a whole: those relating to the defendant's pleading, to the reply, and

to the joinder of causes of action, are given hereafter. In a few of the codes, especially in those of Iowa, Indiana, and Missouri, there are certain special clauses prescribing what may be proved under the answer of denial, and what must be pleaded as new matter, or referring to some mere points of detail: as these clauses are all embraced by implication in the more general provisions common to all the codes, and thus make no change in the law of the States where they are found, they are surplusage, and I have not quoted them. One special provision, however, prescribing a form of complaint or petition in certain cases, may properly be cited here. "In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due thereon to him from the adverse party a specified sum which he claims." New York, § 162; Ohio, § 122; Kansas, § 128; "in an action, counterclaim, or set-off, founded on an account, note, bill of exchange, or other instrument, for the unconditional payment of money only, it shall be sufficient," &c.

meaning of certain terms and phrases used in all the codes ; and it so happens, from the course of judicial decisions involving the question, that these very terms and phrases can be most advantageously examined, and most easily interpreted, in connection with the particular subject of "The Joinder of Causes of Action." The entire discussion will, therefore, be rendered simpler, and useless repetition will be avoided, by adopting the arrangement thus suggested. In pursuing this plan, the subject-matter of the chapter will be separated into the following general divisions: (1) The joinder of different causes of action in one proceeding ; (2) the essential principles which lie at the foundation of the reformed system of pleading ; (3) the general doctrines and practical rules deduced from these principles, which determine and regulate both the external form and the substance of the plaintiff's complaint or petition.

SECTION SECOND.

JOINDER OF CAUSES OF ACTION.

§ 437. The discussion of this important subject will be separated into the following subdivisions : I. The statutory provisions found in the various State codes. II. The forms and modes in which a misjoinder may occur, and the manner in which it must be objected to and corrected. III. The legal import of the term "cause of action," and the case discussed in which only a single cause of action is stated, although several different remedies, or kinds of relief, are demanded. IV. The legal import of the term "transaction ;" discussion of the case of "causes of action arising out of the same transaction, or transactions connected with the same subject of action." V. Instances in which the proper joinder of causes of action is connected with the proper joinder of defendants ; discussion of the provision that all the causes of action must affect all of the parties. VI. Instances in which all the causes of action are against the single defendant, or against all the defendants alike ; and the only question is, whether the case falls within any one of the several specified classes, except the first which embraces those arising out of the same transaction, &c. These subdivisions, I think, entirely exhaust the particular subject-matter to which this section is devoted.

I. *The Statutory Provisions.*

§ 438. The provision, which is found substantially the same — with very slight modifications, if any — in most of the codes, is as follows: “The plaintiff may unite in the same complaint [or petition] several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, when they all arise out of, 1. The same transaction, or transactions connected with the same subject of action; 2. Contract, express or implied; or, 3. Injuries, with or without force, to person and property, or either; or, 4. Injuries to character; or, 5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, 6. Claims to recover personal property, with or without damages for the withholding thereof; or, 7. Claims against a trustee, by virtue of a contract, or by operation of law.

“But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.

“In actions to foreclose mortgages, the court shall have power to adjudge and direct payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant, or obligation, of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases.”¹

¹ New York, § 167; Wisconsin, ch. 125, §§ 31, 32; § 31 is the same as the first paragraph of the text; § 32 is the same as the second, but omitting the words “except in actions for the foreclosure of mortgages;” ch. 145, §§ 11, 12, are substantially the same as the third paragraph; Ohio, §§ 80, 81, are same as the first and second paragraphs of the text, with same omission as in Wisconsin; § 86, — “When the petition con-

tains more than one cause of action, each shall be separately stated and numbered;” Missouri, ch. 110, art. 5, § 2, is the same as the first and second paragraphs of the text, except that class 7 is, “Claims by or against a party in some representative or fiduciary capacity, by virtue of a contract, or by operation of law;” Nebraska, §§ 37, 38, the same as §§ 31, 32, of Wisconsin, and §§ 347, 349 contain same provision as the third para-

§ 439. The scheme contained in all these codes is marked by certain common features, which should be noticed; namely, the express provision for the uniting of legal and equitable causes of action, and the exceedingly general and vague clause permitting the union of causes of action arising out of the same transaction, or transactions connected with the same subject of action. In a few States these peculiar features are wanting; while the other classes of causes of action which may be joined are substantially the same as provided in the arrangement already given. This is the case in Kentucky,¹ in Oregon,² and in California.³ It should be remembered that in Kentucky and in Oregon a slight distinction between legal and equitable proceedings is preserved; and this fact, doubtless, accounts for the form of the provision in the codes of those States. No such distinction remains in California, and, as has been seen in a former chapter, legal and equitable causes of action may be united, according to the established procedure in that State, notwithstanding the omission in the clause expressly regulating such joinder.

§ 440. In other States, the original type set forth in the New-York code has been widely departed from. Thus, in Indiana, an attempt is made to enumerate and arrange the particular classes

graph of the text; Minnesota, § 108, same as §§ 31, 32, of Wisconsin; Kansas, § 83, the same as the first and second paragraphs of the text, and § 88 is the same as § 86 of Ohio, above quoted; Florida, § 117, same as the text; North Carolina, § 126; South Carolina, § 190.

¹ Kentucky, § 111. "Several causes of action may be united in the same petition when each affects all the parties to the action, may be brought in the same county, be prosecuted in the same kind of proceedings, and all belong to one of the following classes: 1. Actions arising out of contract, express or implied. 2. Claims for the recovery of specific real property, and the rents, profits, and damages for withholding the same. 3. Claims for the recovery of specific personal property, and damages for withholding the same. 4. Claims for the partition of real or personal property, or both. 5. Claims arising from injuries to character. 6. Claims arising from injuries to person or property. 7. Claims against a trustee by virtue of a contract, or by operation of law."

² Oregon, § 91, is substantially the

same as in New York, omitting class 1st, and all reference to the union of legal and equitable causes of action.

³ California, Code of Civil Procedure, 1872, § 427. "The plaintiff may unite several causes of action in the same complaint when they all arise out of, 1. Contracts, express or implied; 2. Claims to recover specific real property, with or without damages for withholding thereof, or for waste committed thereon, and the rents and profits of the same; 3. Claims to recover specific personal property, with or without damages for withholding the same; 4. Claims against a trustee by virtue of a contract, or by operation of law; 5. Injuries to character; 6. Injuries to person; 7. Injuries to property. But the causes of action so united shall belong to one only of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

of equitable as well as legal causes of action which may be joined.¹ In Iowa the departure from the common type and the changes of the common law are much wider, and more radical. The code of that State, as those of Kentucky and of Oregon, retains some slight separation between legal and equitable actions, but permits all possible actions that are legal, or all that are equitable, to be united in one petition. The only requirement in reference to their nature is, that all causes of action so united must be in the same kind of proceedings; that is, all legal, or all equitable.²

§ 441. These various statutory provisions will be examined, and the judicial interpretation put upon them will be ascertained, in a subsequent portion of the present section. Their general scope and meaning, however, are very plain. Excepting in Iowa, a plaintiff may unite different causes of action in the one complaint or petition, under the following restrictions: They must affect all the parties; they must all be triable in the same county; and they must all belong to one of the various specified classes. The

¹ Indiana, § 70. "The plaintiff may unite several causes of action in the same complaint when they are included in either one of the following classes: 1. Money demands on contract. 2. Injuries to property. 3. Injuries to person or character. 4. Claims to recover possession of personal property, with or without damages for withholding thereof, and for injuries to the property withheld. 5. Claims to recover possession of real property, with or without damages for the withholding thereof, and rents and profits of the same; to make partition thereof, and to determine and quiet the title to real property. 6. Claims to enforce the specific performance of contracts, and to avoid contracts for fraud or mistake. 7. Claims to foreclose mortgages; to enforce or discharge specific liens; to subject to sale real property upon demands against decedents' estates, when such property has passed to heirs, devisees, or their assigns; to marshal assets, and to substitute one person to the right of another; and all other causes of action arising out of a contract or a duty, and not falling within either of the foregoing classes. But causes of action so joined must affect all the parties to the action, and not require different places of trial.

"§ 71. When the plaintiff desires to recover possession of title-papers or other instruments in writing, or to correct any mistakes therein, a separate action may be brought therefor, or the possession of such title-papers or other instruments in writing may be recovered, or mistakes corrected in any other action, when such recovery or correction would be essential to a complete remedy. § 72. When the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes."

² Iowa, code of 1878, § 2680. Prior code, § 2844. "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same parties and against the same party in the same right, and if suit on all as to venue may be brought in the same county, may be joined in the same petition. But the court, to prevent confusion therein, may direct all or any portion of the issues so joined therein to be tried separately, and may determine the order thereof."

result is, that all the causes of action so united must be either upon contract, or for injuries to person or property, and the like, unless they all arise out of the same transaction, or transactions connected with the same subject of action. This latter exception does not, as has been seen, prevail in a few of the States; but, where it does prevail, the most incongruous and dissimilar causes of action may be joined, if they arise out of the same transaction, or transactions connected with the same subject of the action, within the meaning of that phrase. It is evident that very little difficulty can arise in interpreting and applying most of the classes. The real doubts and uncertainties grow out of (1) the confounding the reliefs demanded by the plaintiff with the cause of action upon which such demand is based; and this confusion is more apt to exist in equity causes, and especially in those where legal relief is prayed for as well as equitable; (2) the clause permitting the joinder of causes of action arising out of the same transaction, &c. "Transaction" has had no technical legal meaning, and is a word of very vague import at best; but this vagueness is largely increased by the additional clause which permits causes of action arising out of transactions connected with the same subject of action to be united. These are the two chief, and almost only, sources of doubt in the practical construction of the passage in question. The first one — the liability of confounding the reliefs demanded with the causes of action — may, of course, be avoided by the exercise of care and discrimination: the second is much more embarrassing, and it is hardly possible that all doubt should ever be removed from the legal meaning of the language.

II. *The Forms and Modes in which a Misjoinder may occur, and the Manner in which it must be objected to and corrected.*

§ 442. All of the codes require that the different causes of action should be separately stated. In other words, each must be set forth in a separate and distinct division of the complaint or petition, in such a manner that each of these divisions might, if taken alone, be the substance of an independent action. In fact, the whole proceeding is the combining of several actions into one. At the common law, these separate divisions of the declaration were termed "counts;" and that word is still used

by text-writers and judges, although, with one or two exceptions, it is not authorized by the codes; and it tends to produce confusion and misapprehension, since the common-law "count" was substantially a very different thing from the "cause of action" of the new procedure. In one or two States, the term "paragraph" is used to designate these primary divisions. The difficulty in the use of this term is, that it is now very generally used in England, and in most of the States where the reformed system prevails, to designate the short subdivisions, or allegations, of facts into which each cause of action is separated, according to a mode of pleading which has become very common. The term "cause of action" is perhaps as proper as any which can be used for the purpose. That such a separation should be made, and that each distinct cause of action should be stated in a single and independent division, so that the defendant may answer or demur to it without any confusion with others, is plainly indispensable to an orderly system of pleading, and is expressly required by all the codes; and in some of the States the courts have strictly enforced the requirement, and have thereby done much to prevent the formal presentations of the issues to be tried from falling into that confused and bungling condition which exists to so great an extent in certain of the States.

§ 448. The special provisions respecting the manner of raising an objection to a misjoinder of causes of action, and the effect thereof, are as follows: In all the codes but two, it is prescribed that the defendant may demur to the complaint, or petition, if it shall appear on the face thereof that several causes of action have been improperly united; that, if the error does not so appear, the objection may be taken by the answer; and that, if not taken in either of these modes, it is waived.¹ The sustaining of a demurrer upon this ground is not fatal to the action in all the States. Several codes contain the very just provision, that, when such a demurrer is sustained, the court may simply order the action to be divided into as many as may be necessary for the

¹ See these provisions, collected in the text or notes, *supra*, § 438. These rules are identical with those which regulate the method of objecting to a defect of parties; and the decisions already cited (§§ 206, 207, 287), of course, apply to the present subject-matter. If the objection

appears on the face of the pleading, it must be raised by demurrer, and not by answer; and this is substantially the same as saying that it must always be raised by demurrer, because the misjoinder will always appear on the face of the pleading.

proper hearing and determination of the causes of action set forth in the original pleading.¹ The plaintiff is thus not thrown out of court in respect of any of the causes of action alleged by him; he is merely required to separate the single cause into the number of independent suits which he should have originally brought.

§ 444. In one or two States a misjoinder is attended with even less serious consequences than this, the sole object of the statutory provision on the subject being to secure a trial of each cause of action before the proper tribunal. In Iowa there can be no misjoinder, properly so called, except by uniting a legal and an equitable cause of action. Still, if two legal causes are so utterly incongruous as to prevent a trial of them together, the court may order them to be tried separately. The clauses of the Iowa code are found in the foot-note.² The provisions of the Kentucky code, in reference to the remedy for a misjoinder, are similar to those of Iowa.³ The practice in Indiana differs from that which prevails in the States generally, and also from that established in Iowa. A demurrer for misjoinder is permitted; but its effect

¹ New York, § 172; Ohio, § 90; Wisconsin, ch. 125, § 38 (last clause); Nebraska, § 97; Kansas, § 92; Florida, § 122 (last clause); North Carolina, § 181; South Carolina, § 195.

² Iowa, code of 1878, § 2681. "The plaintiff may strike from his petition any cause of action, or any part thereof, at any time before the final submission of the case to the jury, or to the court when the trial is by the court." § 2682. The court, at any time before the defence, shall, on motion of the defendant, strike out of the petition any cause of action or causes of action improperly joined with others." The "defence" here spoken of is undoubtedly the entering upon his defence at the trial by the defendant, and not the putting in his answer. The language of the preceding section plainly points to this construction. "§ 2683. All objections to the misjoinder of causes of action shall be deemed to be waived, unless made as provided for in the last section."—that is, by motion; a misjoinder is not a ground of demurrer. "§ 2684. When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff,

shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action shall be docketed for each of said petitions; and the same shall be proceeded with without further service; and the court shall determine, by order, the time of pleading therein." This mode of procedure is simple, and eminently just, and sweeps away a mass of technical defences which still disfigure the pure ideal of the American system in many States. For a construction of these provisions, see *Hinkle v. Davenport*, 88 Iowa, 855, 858; *Cobb v. Ill. Cent. R. R.*, 88 Iowa, 601, 616; *Grant v. McCarty*, 38 Iowa, 468.

³ Kentucky code, §§ 118, 114; *Sale v. Critchfield*, 8 Bush, 636, 646. The defendant must move before answer that plaintiff elect between the causes of action, and strike out the others; if no such motion is made, the objection is waived. The same rule prevails as to the misjoinder of parties, which is never ground of demurrer; defendant must move to strike out the improper parties, or else waive all objection. *Dean v. English*, 18 B. Mon. 182; *Yeates v. Walker*, 1 Duv. 84.

can never be fatal to the action. In fact, the matter seems to be practically left in the discretion of the lower or trial court, and any disposition of the objection to a misjoinder made by it cannot be assigned as error so as to reverse a judgment on review. The sections of the Indiana code are quoted in the note.¹

§ 445. There is another section found in all the codes, which has an important bearing upon the subject under consideration in some of its aspects, — that which permits the correction of pleadings at the instance of the adverse party on his motion by striking out irrelevant and redundant matter, and by requiring the pleading to be made more definite and certain by amendment where its allegations are so indefinite and uncertain that the precise nature of the charge or defence is not apparent.²

§ 446. Three forms or modes of alleged misjoinder are possible, and they must be examined separately in respect to the manner in which the objection thereto should be taken. They are, (1) When different causes of action which may properly be united are alleged in the one complaint or petition not distinctly and separately as required by the statute, but combined and mingled together in a single statement. (2.) When different causes of action which cannot properly be united are alleged in the one complaint or petition, and are separately and distinctly stated. (3) When different causes of action which cannot properly be united are alleged in the one complaint or petition not distinctly and separately, but combined and mingled together in a single statement. These three cases will be examined in order.

¹ Indiana code, § 50. "The defendant may demur to the complaint when it appears upon the face thereof, . . . 5th, that several causes of action have been improperly joined. § 51. When a demurrer is sustained on the ground of several causes of action being improperly united in the same complaint, the court shall order the misjoinder to be noted on the order-book, and cause as many separate actions to be docketed between the parties as there are causes of action decided by the court to be improperly joined; and each shall stand as a separate action; and the plaintiff shall thereupon file a separate complaint in each of the above cases, to which the defendant shall enter his appearance, and plead and go to trial, or suffer a default, in the same manner as in the original action. § 52. No judg-

ment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." "§ 54. When any of the matters mentioned in § 50 do not appear on the face of the complaint, the objection (except for misjoinder of causes of action) may be taken by answer." It is plain from the foregoing that the practical effect of a successful demurrer is trivial. It compels the separation of the action, and the trial of two or more suits instead of one. No discretion is left to the court, as in New York, Iowa, and other States; the court *shall* cause the separate actions to be docketed. See *Clark v. Lineberger*, 44 Ind. 223, 227, that no objection can be raised on appeal.

² See *supra*, § 434.

§ 447. (1.) Although the sections of the codes, defining what causes of action may be united, all require in positive terms that when so joined each must be separately stated, it is settled by the weight of authority, and seems to be the general rule, that a violation of this particular requirement is not a ground of demurrer. This conclusion is based upon the language of the codes authorizing a demurrer for the reason that causes of action "are improperly united in the complaint or petition." It is said that this expression only points to the case in which causes of action have been embraced in one pleading which could not properly be joined; while in the special case under consideration it is assumed that all the causes of action may be united, and the only error consists in the external form or manner of their joinder. The remedy is, therefore, not by a demurrer, but by a motion to make the pleading more definite and certain by separating and distinctly stating the different causes of action.¹ The plaintiff can thus be compelled to amend his complaint or petition, and to state each cause of action by itself, so that the defendant may deal with it by answer or demurrer as the nature of the case demands. It seems to be the settled rule in California, however, that the defect may properly be taken advantage of by demurrer.²

§ 448. (2.) When causes of action separately stated are improperly united in the same complaint or petition, the rule which prevails in all the States, except in the few whose special legislation has already been described, is the same as that which

¹ *Bass v. Comstock*, 88 N. Y. 21; 86 How. Pr. 382, and cases cited; *Wood v. Anthony*, 9 How. Pr. 78; *Hendry v. Hendry*, 32 Ind. 849; *Mulholland v. Rapp*, 50 Mo. 42; *Pickering v. Miss. Valley Nat. Tel. Co.*, 47 Mo. 457, 460; *House v. Lowell*, 45 Mo. 381. See *Wiles v. Suydam*, 6 N. Y. Sup. Ct. 292. A different rule formerly prevailed in Missouri, and it was held that the error was not only ground for a demurrer, but even for a motion in arrest of judgment after verdict! *McCoy v. Yager*, 84 Mo. 134; *Clark's Administrator v. Han. & St. Jo. R. R.*, 38 Mo. 202; *Hogland v. Han. & St. Jo. R. R.*, 39 Mo. 461; *Farmers' Bank v. Bayliss*, 41 Mo. 274, 284, per *Holmes J.* These prior cases, however, are expressly overruled

by the more recent decisions of the same court cited above.

² *Nevada, &c. Canal Co. v. Kidd*, 48 Cal. 180, 87 Cal. 282; *Watson v. San Francisco, &c. R. R.*, 41 Cal. 17, 19; *Buckingham v. Waters*, 14 Cal. 146; *White v. Cox*, 46 Cal. 169. In *Wright v. Conner*, 84 Iowa, 240, 242, it was said: "If through bad pleading two or more distinct causes of action or defences are contained in one division of a petition or answer, which is called a count, a demurrer may be directed at one of them if insufficient at law." In strictness, the objecting party ought first to require, by motion, that the petition or answer be properly divided, or an election made between the causes of action or the defences; but, omitting this, he may demur.

applies to the case of a defect of parties. If the error appears on the face of the pleading, the defendant must demur, and cannot raise the objection by answer. The statute adds, that, if the error do not thus appear on the face of the pleading, the defence may be presented by the answer. If the defendant omits to use either of these methods properly, he is deemed to have waived the objection. The practical result is, that a demurrer must always be resorted to, or all objection to such misjoinder will be waived.¹ The demurrer may be by any of the defendants;² and it must be to the entire complaint or petition, and not to any cause or causes of action supposed to have been improperly joined.³ To sustain a demurrer for this reason, however, the complaint must contain two or more good grounds of suit which cannot properly be joined in the same action. When a complaint, therefore, consists of two or more counts, and one sets forth a good cause of action, and another does not although it attempts to do so, the pleading is not demurrable on the ground of a misjoinder, even though the causes of action could not have been united had they been sufficiently and properly alleged.⁴

§ 449. In a very few States, however, the practice is different, and a demurrer is not permitted as the remedy for a misjoinder. It is so in Kentucky. The defendant must move to strike out, or to compel the plaintiff to elect which cause of action he will proceed upon, and to dismiss the others; and a failure to make such motion is a complete waiver of the objection. The plaintiff may also at any time before trial withdraw any cause of action.⁵ The sections of the Iowa code quoted in § 444 show that a similar practice exists in that State.

¹ *Blossom v. Barrett*, 37 N. Y. 484, 436; *Smith v. Orser*, 43 Barb. 187, 198; *Mead v. Bagnall*, 15 Wisc. 136; *Jamison v. Copher*, 35 Mo. 483, 487; *Ashby v. Winston*, 26 Mo. 210; *Hibernia Savings Soc. v. Ordway*, 38 Cal. 679; *Lawrence v. Montgomery*, 37 Cal. 183.

² *Ashby v. Winston*, 26 Mo. 210.

³ *Bougher v. Scobey*, 16 Ind. 151, 154; and must be on the specific ground of the misjoinder: a demurrer for want of sufficient facts does not raise the objection. *Cox v. West. Pac. R. R.*, 47 Cal. 87, 89, 90.

⁴ *Truesdell v. Rhodes*, 26 Wisc. 215, 219; *Bassett v. Warner*, 28 Wisc. 678, 689,

690; *Willard v. Reas*, 26 Wisc. 540, 544; *Lee v. Simpson*, 29 Wisc. 333; *Cox v. West. Pac. R. R.*, 47 Cal. 87, 89, 90.

⁵ *Forkner v. Hart*, *Stanton's code*, p. 60; *Wilson v. Thompson*, *ib.* p. 60; *Hart v. Cundiff*, *ib.* p. 61; *Hord v. Chandler*, 18 B. Mon. 403; *McKee v. Pope*, 18 B. Mon. 548, 555; *Bonney v. Reardin*, 6 Bush, 84; *Dragoo v. Levi*, 2 Duv. 520; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Hancock v. Johnson*, 1 Metc. 242; *Salé v. Crutchfield*, 8 Bush, 636, 646; *Hinkle v. Davenport*, 38 Iowa, 355, 358; *Cobb v. Ill. Cent. R. R.*, 38 Iowa, 601, 616; *Grant v. McCarty*, 38 Iowa, 468.

§ 450. (3.) The third case presents some difficulties. When the complaint or petition contains causes of action which cannot properly be united, and they are mingled and combined in the same allegations, — in other words, the pleading *in form* sets forth but one cause of action, while in reality it embraces two or more which cannot be joined in any form, — is the defendant's remedy by demurrer, or by motion in the first instance that the pleading be made more definite and certain by separating the causes of action, and by demurrer when such separation has been accomplished? In Missouri it is definitely settled that the remedy is by demurrer.¹ That this is the proper practice is implied with more or less distinctness by decisions in several other States.²

§ 451. There are grave difficulties attendant upon the adoption of such a rule, although it seems to be generally supported by the decided cases. When upon sustaining a demurrer interposed upon the ground of a misjoinder of causes of action, the action itself is not defeated, but the causes of action improperly united are merely separated, and new actions corresponding with such division are proceeded with, it would seem to be a necessary prerequisite that the causes of action should have been separately and distinctly stated in the original pleading. To allow the demurrer to a complaint or petition in which several causes of action are mingled up, and to divide this mass of confused allegations into as many complaints as there are causes of action, would seem to be a work of great difficulty, if not of absolute impossibility. Again: it is always difficult if not impossible to determine with exactness whether a complaint or petition does contain two or more different causes of action when the allegations are thus combined into one statement. If the averments are found sufficient to express one cause of action, it may generally be said that the other averments are mere surplusage, which should be rejected on a motion made for that purpose, and not the material allegations which set forth a second cause of action.

¹ *Mulholland v. Rapp*, 50 Mo. 42; *Ederlin v. Judge*, 36 Mo. 350; *Young v. Coleman*, 48 Mo. 179, 184; *Cheely's Administrator v. Wells*, 33 Mo. 106, 109. And see *Pickering v. Miss. Valley Co.*, 47 Mo. 457; *House v. Lowell*, 45 Mo. 381.

² *Cary v. Wheeler*, 14 Wisc. 281; *Burrows v. Holderman*, 31 Ind. 412; *Lane*

v. State, 27 Ind. 108, 112; *Fritz v. Fritz*, 23 Ind. 388, 390; *Hibernia Savings Soc. v. Ordway*, 38 Cal. 679; *Anderson v. Hill*, 53 Barb. 238. See, however, *Rogers v. Smith*, 17 Ind. 828, per *Perkins J.*, which seems to hold that the remedy should be by motion.

For these reasons, which are based chiefly upon notions of convenience, a demurrer does not seem to be an appropriate remedy until the causes of action have been separated, and it is known with certainty what and how many they are. In this case, therefore, the more convenient practice would seem to be a motion in the first instance to make the pleading more certain and definite by arranging it into distinct causes of action, or a motion to strike out the redundant matter and surplusage and thus reduce it to a single definite cause of action. The latter order would take the place of a demurrer; the former would be followed by a demurrer after the causes of action had been separated.

III. *Meaning of the term "Cause of Action;" Where one Cause of Action only is stated, although several different kinds of relief are demanded.*

§ 452. The cause of action is very often confounded with the remedy. This mistake or misconception is peculiarly apt to occur in cases where, under the code, the plaintiff seeks to obtain legal and equitable relief combined, the right to such reliefs springing from the same state of facts. To avoid this tendency to confusion, it is absolutely necessary to ascertain and fix with certainty the true meaning of the term "cause of action." The American courts of the present day seem to avoid the announcement of any general principle, or the giving of any general definitions. While, therefore, they have repeatedly held that but one cause of action was stated in a case before them, and have carefully distinguished it in that instance from the reliefs demanded, they have not attempted to define the term "cause of action" in any general and abstract manner, so that this definition might be used as a test in all other cases. We shall obtain no direct help, therefore, from their decisions; but they will furnish examples and tests to determine whether any definition which may be framed is accurate. I shall, however, attempt a definition or description, basing it upon an analysis of the essential elements which enter into every judicial proceeding for the protection of a private right on the one side, and the enforcement of a private duty on the other. There are such elements or features which necessarily combine in every action;

they are independent of any judicial recognition ; they exist in the very nature of things ; and, if we can by an accurate analysis discover these elements, we shall at once have obtained a correct notion of the term "cause of action."

§ 453. Every action is brought in order to obtain some particular result which we term the *remedy*, which the code calls the "relief," and which, when granted, is summed up or embodied in the judgment of the court. This result is not the "cause of action" as that term is used in the codes. It is true, this final result, or rather the desire of obtaining it, is the primary motive which acts upon the will of the plaintiff and impels him to commence the proceeding, and in the metaphysical sense it can properly be called the cause of this action, but it is certainly not so in the legal sense of the phrase. This final result is the "object of the action" as that term is frequently used in the codes and in modern legal terminology. It was shown in the opening paragraphs of the introductory chapter that every remedial right arises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements : a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant ; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty ; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated, or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several States. They are the legal cause or foundation whence the right of action springs, this right of action being identical with the "remedial right" as designated in my analysis. In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in an abstract form is never alleged by the plaintiff ; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be

the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong.

§ 454. The cause of action thus defined is plainly different from the remedial right, and from the remedy or relief itself. The remedial right is the consequence, the secondary right which springs into being from the breach of the plaintiff's primary right by the defendant's wrong, while the remedy is the consummation or satisfaction of this remedial right. From one cause of action, that is, from one primary right and one delict being a breach thereof, it is possible, and not at all uncommon, that two or more remedial rights may arise, and therefore two or more different kinds of relief answering to these separate remedial rights. This is especially so when one remedial right and corresponding relief are legal, and the other equitable; but it is not confined to such cases. One or two very familiar examples will sufficiently illustrate this statement, and will show the necessity as well as the ease of discriminating between the "cause of action" and the remedy. Let the facts which constitute the plaintiff's primary right be a contract duly entered into by which the defendant agreed to convey to the plaintiff a parcel of land, and full payment by the plaintiff of the stipulated price and performance of all other stipulations on his part. Let the delict be a refusal by the defendant to perform on his part. This is the cause of action, and it is plainly single. From it there arise two remedial rights and two corresponding kinds of relief; namely, the remedial right to a compensation in damages, with the relief of actual pecuniary damages; and the remedial right to an actual performance of the agreement, and the relief of an execution and delivery of the deed of conveyance. If the plaintiff in one action should state the foregoing facts constituting his cause of action, and should demand judgment in the alternative either for damages or for a specific performance, he would, as the analysis above given conclusively shows, have alleged but one cause of action, although the reliefs prayed for would be distinct, and would have belonged under the old system to different forums,—the common law and the equity courts. Again: let the plaintiff's primary right be the ownership and right to possession of a certain tract of land, and let the facts from which it arises be properly alleged; let the delict consist in the defendant's wrong-

ful taking and retaining possession and user of such land for a specified period of time, and let the facts showing this wrong be properly averred in the same pleading. Evidently the plaintiff will have stated one single and very simple cause of action. The remedial rights arising therefrom, and the remedies themselves corresponding thereto, will be threefold, and all of them legal: namely, (1) the right to be restored to possession, with the actual relief of restored possession; (2) the right to obtain compensation in damages for the wrongful withholding of the land, with the relief of actual pecuniary damages; and (3) the right to recover the rents and profits received by the defendant during the period of his possession, with the relief of an actual pecuniary sum in satisfaction therefor. Here, also, the single nature of the one cause of action plainly appears, and its evident distinction from the various remedial rights and actual remedies which do or may arise from it.¹

§ 455. The result of this analysis of the necessary elements which enter into every action is simple, easily to be understood, and yet exceedingly important; and the principle I have thus deduced will serve as an unerring test in determining whether different causes of action have been joined in a pleading, or whether one alone has been stated. If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim that he is entitled to, and may ask to recover; the relief is no part of the cause of action. In applying this test, however, it must be observed that the single primary right, and the single wrong, which, taken together, constitute the one cause of action, may each be very complicated. For example, the primary right of ownership includes not only the particular subordinate rights to use the thing owned in any manner permitted by the law, but also similar rights to the forbearance on the part of all mankind to molest the proprietor in such use. The facts which constitute the delict complained of may embrace not only the wrongful obtaining, and keeping possession, in such a case as the one last

¹ The fact that the codes generally seem to treat these different claims for relief as distinct causes of action does not affect the correctness of my analysis; they are plainly no more than separate reliefs

or remedies based upon the same facts which constitute a single cause of action. See *Larned v. Hudson*, 57 N. Y. 151, which is based entirely upon the language of the statute.

supposed, but also the procuring and holding deeds of conveyance, or other muniments of title, by which such possession is made possible, and to appear rightful. These suggestions are necessary to guard against the mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong, which, in connection with others, may make up the composite but single delict complained of.

§ 456. On the other hand, if the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct and separate wrongs, it follows inevitably, from the foregoing principle, that the plaintiff has united two or more causes of action, although the remedial rights arising from each, and the corresponding reliefs, may be exactly of the same kind and nature. If two separate and distinct primary rights could be invaded by one and the same wrong, or if the single primary right should be invaded by two distinct and separate legal wrongs, in either case two causes of action would result; *a fortiori* must this be so when the two primary rights are each broken by a separate and distinct wrong.

§ 457. The general principle which I have thus drawn from an analysis of the essential elements which make up a judicial action can be applied to all possible cases, and will furnish a sure and simple test by which to determine whether one or more causes of action have been embodied in any complaint or petition. The demand for relief must be entirely disregarded; whether single or complex, it forms no part of, and has no effect upon, the "cause of action." Rejecting, therefore, all those portions of the pleading which describe the remedy or relief demanded, the inquiry should be directed exclusively to the allegations of fact which set forth the primary right of the plaintiff and the wrong done by the defendant. If one such right alone, however comprehensive, is asserted, and if one such wrong alone, however complex, is complained of, but one cause of action is alleged. If the examination discloses more than one distinct and independent primary right held by the plaintiff, and all of them invaded by the defendant, or more than one distinct and independent wrong done by the defendant to the plaintiff's primary right or rights,

then the complaint, or petition, has united different causes of action, and the rules which control their joinder are brought into operation.

§ 458. Although the decisions do not attempt to furnish any general test by which one may determine the nature of a "cause of action," and whether a pleading contains one or more, they fully recognize the fact that the cause of action is not to be confounded with the relief, and that the demand for, or the granting of, many forms of remedy, may be based upon a single cause of action. The following cases not only exhibit the proneness to confound the remedy with the cause of action, and the necessity of understanding the essential distinction between them, but they also illustrate, and fully sustain, the foregoing principles, which I have proposed as the test by which such distinction may be at once recognized: A complaint alleged that the plaintiff, being indebted to the defendant upon several promissory notes held by the latter, had assigned to it a bond and mortgage as collateral security; that the defendant had collected the amount due on the bond and mortgage, which was more than sufficient to pay all the notes in full; that a surplus was left remaining in its hands, and upon these facts demanded payment by the defendant of such balance, and surrender and cancellation of the notes so given by the plaintiff. To this complaint the defendant demurred, on the ground that causes of action had been improperly joined. The New-York Court of Appeals held that there was no uniting at all of different causes of action, and that only a single one was stated, although two distinct reliefs were demanded.¹

¹ *Cahoon v. Bank of Utica*, 7 N. Y. 486. The defendant insisted that a cause of action for the recovery of money was united with one equitable in its nature. The court said, per Johnson J. (p. 488): "The ground on which this case ought to be put is, that the complaint does not contain two causes of action. The claim is single. . . . The plaintiff now seeks an account of the proceeds of the mortgage and of their disposition, and to have the balance paid over, and the notes which are satisfied delivered up. It is no answer to say that the balance of moneys could have been recovered in an action for money had and received. It would none the less have been the proper foundation for a bill in equity. . . . It is only because there is no dispute about the

amount due that there seems to be any room for mistake as to the character of the claim. If that remained to be ascertained, it would be the clearest possible case for an account; and yet this case is not clearer than the one before us. . . . It is, in short, a complaint by a debtor to have his obligation delivered up and cancelled, and an account of the securities pledged, and payment of the surplus. That a claim so simple in its character, so well recognized, and even familiar, under the old practice in chancery, should be seriously regarded as two distinct causes of action, requiring distinct modes of trial, and incapable of being joined in a single suit, is quite as surprising as the doctrine itself, if held to be well founded, would be inconvenient." See also *Connor v.*

§ 459. Actions brought to reform instruments in writing, such as policies of insurance, and other contracts, mortgages, deeds of conveyance, and the like, and to enforce the same as reformed by judgments for the recovery of the money due on the contracts, or for the foreclosure of the mortgages, or for the recovery of possession of the land conveyed by the deeds, fall within the same general principle. One cause of action only is stated in such cases, however various may be the reliefs demanded and granted.¹ The principle also applies to actions brought against a fraudulent grantor or assignor and his grantees or assignees to set aside the transfers, although made at different times and to different persons, and to subject the property to the plaintiff's liens, as in creditors' suits; or to compel a reconveyance and restoration of possession of the property, as in the case of suits by defrauded heirs or *cestuis que trustent*, and the like. There is but one cause of action against the various defendants in these and similar suits.² In like manner, the principle applies to actions

Board of Education, 10 Minn. 439, 444; Sortore v. Scott, 6 Lans. 271, 275, 276; Reedy v. Smith, 42 Cal. 245, 250.

¹ Bidwell v. Astor Mut. Ins. Co., 16 N. Y. 268; N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 857; Guernsey v. Am. Ins. Co., 17 Minn. 104, 108, actions to reform a policy of insurance, and to recover the amount due on it as reformed; Gooding v. McAllister, 9 How. Pr. 123, action to reform a written contract, and to recover a money judgment upon it for the sum due when corrected; McCown v. Sims, 69 N. C. 169; Rigsbee v. Trees, 21 Ind. 227, actions to reform a promissory note, and to recover the amount thus shown to be due. The decision in the latter case is referred, however, to the special provision of the Indiana code, § 72, quoted *supra* in § 440; Hunter v. McCoy, 14 Ind. 628; McClurg v. Phillips, 49 Mo. 315, 316, actions to reform a mortgage, to foreclose as thus corrected, or to reform a deed and quiet the title thereunder; Walkup v. Zehring, 13 Iowa, 806, action to correct mistakes in a series of title-deeds, to set aside another deed of the same land, and to quiet the plaintiff's title and possession. See, however, *per contra*, Harrison v. Juneau Bank, 17 Wisc. 340, which was a suit to reform a contract, and to recover

the money due upon it when corrected. Dixon C. J. said (p. 350): "The complaint contains two distinct causes of action, — the one equitable, the other legal, — which in strictness should have been separately stated. That for the reformation was equitable, and was for the court; the other, for the recovery of money, was legal, and was for the jury." The learned court has here fallen into the evident error of confounding the cause of action with the relief; and its decision is in direct conflict with the doctrine established by the numerous authorities quoted above and below, which involve similar facts and the same principle. The doctrine of this case has become established in Wisconsin; a union of equitable and legal causes of action is hardly permitted in that State.

² Bassett v. Warner, 23 Wisc. 673, 685; Blake v. Van Tilborg, 21 Wisc. 672; Bowers v. Keesecher, 9 Iowa, 422; Howe v. Moody, 14 Fla. 59, 63, 64. These were actions by heirs, or other persons in the position of beneficiaries, against administrators, or other individuals holding a fiduciary relation to them, and their grantees or assignees, to set aside fraudulent transfers, to compel an accounting and a restoration, and other like reliefs. The doctrine of the text was freely applied in

brought by persons holding the equitable title to lands against those in whom the legal title is vested, for the purpose of setting aside the deeds under which the latter claim, on the ground of fraud or other illegality, and of recovering or confirming possession and quieting title. The different reliefs which the plaintiff seeks to obtain do not constitute different causes of action.¹ It also applies to actions for the foreclosure of mortgages, where the plaintiff seeks to obtain not only a sale of the mortgaged premises, but also a judgment for a deficiency against the mortgagor and other persons who are personally liable for the debt. In several States, the codes expressly authorize such actions.² The weight of authority, however, in those States whose codes do not contain such express provisions, seems to be the other way; and the rule therein seems to be generally established, that, in an action of foreclosure, a judgment for a deficiency cannot be obtained against any persons liable for the debt other than the mortgagor himself; it is said that the making such third person a party, and the praying a decree for deficiency against him, is a misjoinder of causes of action.³ A suit by the vendor of land to recover the purchase price, and to enforce his lien therefor upon the premises sold or conveyed, includes but one cause of action, the double relief plainly arising from the single state of facts.⁴

§ 460. The following are some additional instances in which the doctrine has been approved and enforced by the courts, and the cause of action held to be a single one: An action against a

them all: *Winslow v. Dousman*, 18 Wisc. 456; *Gates v. Boomer*, 17 Wisc. 456; *North v. Bradway*, 9 Minn. 183; *Chautauqua Co. Bank v. White*, 6 N. Y. 286. These actions were all ordinary creditors' suits.

¹ *Phillips v. Gorham*, 17 N. Y. 270; *Laub v. Buckmiller*, 17 N. Y. 620; *Lattin v. McCarty*, 41 N. Y. 107. For the facts and extracts from the opinions in these important cases, see *supra*, ch. 1, §§ 68, 78, and notes.

² *Conn. Mut. Life Ins. Co. v. Cross*, 18 Wisc. 109; *Sauer v. Steinbauer*, 14 Wisc. 70; *Weil v. Howard*, 4 Nev. 384; *Greither v. Alexander*, 15 Iowa, 470, 473, per *Wright C. J.*; *Eastman v. Turman*, 24 Cal. 379, 382, per *Sawyer J.*; *Rollins v. Forbes*, 10 Cal. 299; *Farwell v. Jackson*, 28 Cal. 105.

³ *Faesi v. Goetz*, 15 Wisc. 281; *Cary v. Wheeler*, 14 Wisc. 281; *Jesup v. City Bank*, 14 Wisc. 331; *Stilwell v. Kellogg*, 14 Wisc. 461; *Borden v. Gilbert*, 13 Wisc. 670; *Doan v. Holly*, 26 Mo. 186; 25 Mo. 357. In *Ladd v. James*, 10 Ohio St. 437, it was said that when a mortgage is given to secure a note, and an action is brought setting out both, and demanding judgment for money on the note, and for a foreclosure and sale on the mortgage, any issue of fact affecting the former demand for relief must be tried by a jury if either party require it. See also *McCarthy v. Garraghty*, 10 Ohio St. 438.

⁴ *Stephens v. Magor*, 25 Wisc. 533; *Turner v. Pierce*, 34 Wisc. 658; *Walker v. Sedgwick*, 8 Cal. 398. In the latter case, the action was on notes given for the price.

husband and wife brought upon an alleged indebtedness of both, and an agreement of both to secure the same by a mortgage upon the wife's lands, although at the trial the debt was shown to be against the husband alone, and no such agreement as the one alleged was proven ;¹ an action by the vendee in a land contract for a specific performance and for damages, where judgment was given for damages alone ;² an action by the heirs and administrator of a deceased *cestui que trust* against the trustee who held both real and personal estate in trust, for an accounting, a conveyance of the land, and a transfer of the personal property ;³ an action to remove a nuisance, for damages, and for an injunction ;⁴ for admeasurement of dower, possession and recovery of rents and profits ;⁵ by one tenant in common against the other, to compel a specific performance of the latter's agreement to convey his share, or for a partition ;⁶ an action by a stockholder against a bank, its officers, and their assignee, to set aside an assignment, to remove the officers, for an accounting, and for a winding-up of the corporation, — all based upon the fraudulent practices of the officers ;⁷ where a debtor who had executed a deed to A. in trust for his creditor B. alleged that the two had fraudulently sold the land which had been bought in by B., and sought to set aside the sale and to redeem ;⁸ an accounting against the executor of a father and the administrator of his son, where the estates were so mingled and confused that a separate accounting was impossible ;⁹ an action against the executor of a lessee who had continued to occupy the premises, to recover the rent accruing before the death, as well as that accruing after ;¹⁰ an action to recover damages for negligently driving against and injuring the plaintiff and his horse and carriage ;¹¹ an action to recover damages for

¹ Marquat v. Marquat, 12 N. Y. 336.

² Barlow v. Scott, 24 N. Y. 40; Sternberger v. McGovern, 56 N. Y. 12, 21. And see Duvall v. Tinsley, 54 Mo. 93, 95.

³ Richtmyer v. Richtmyer, 50 Barb. 55.

⁴ Davis v. Lambertson, 56 Barb. 480.

⁵ Brown v. Brown, 4 Robt. 688.

⁶ Hall v. Hall, 38 How. Pr. 97. This decision is certainly opposed to the principle stated in the text, and to the weight of authority. Two different primary rights are clearly stated ; one based upon

the contract, and the other upon the ownership in common.

⁷ Mitchell v. Bank of St. Paul, 7 Minn. 252, 255.

⁸ McGlothlin v. Hemery, 44 Mo. 350. The opinion in this case is an elaborate discussion of the entire doctrine.

⁹ McLachlan v. Staples, 13 Wisc. 448, 451.

¹⁰ Pugsley v. Aikin, 11 N. Y. 494.

¹¹ Howe v. Peckham, 10 Barb. 656 (S. T.). The correctness of this decision is more than doubtful. Mason J. makes the cause of action to consist of the delict

fraudulent representations in the sale of some sheep, the plaintiff claiming special damages for the destruction of his entire flock, caused by the communication of disease from those which he had purchased ;¹ an action for malicious prosecution, in which special acts of wrong and damage were alleged ;² and, it has been said, an action to recover damages for several distinct and separate breaches of one contract.³

§ 461. To the principle which I have thus stated, and the doctrine approved by such an overwhelming weight of judicial authority, there was opposed a series of decisions in Missouri, which, while they remained unquestioned, rendered the law of that State widely different in this respect from that which was established in other commonwealths. The Supreme Court held in numerous cases, and a great variety of circumstances, that where upon the facts the plaintiff would ultimately be entitled to different kinds of relief,—such as, for example, the setting aside deeds of conveyance to the defendant, and the recovery of the possession of the land,—if, after alleging all the facts, he should demand the separate reliefs, his complaint would contain different causes of action, and would be held bad on demurrer, or even judgment arrested after verdict, or reversed on appeal because of the error. In other words, the court completely identified the relief, and even the prayer for it, with the cause of action.⁴ The court has, however, recently receded from this most untenable position, and seems to have overruled this long series of decisions.⁵ The Missouri court seems to have finally brought the law of that State in reference to the subject-matter under consideration into harmony with the plain intent of the code and the well-settled doctrines of equity jurisprudence, as well as into a conformity with the rule settled by the unanimous consent of other courts.

alone. Certainly the plaintiff's right to his own person and to his property were different rights, and the injury to them created two causes of action.

¹ *Wilcox v. McCoy*, 21 Ohio St. 655, citing *Packard v. Slack*, 32 Vt. 9.

² *Schenck v. Butsch*, 32 Ind. 338.

³ *Fisk v. Tank*, 12 Wisc. 276, 298, per *Dixon C. J.* The acts and defaults complained of in this case can hardly be called distinct and separate breaches.

See *Boehring v. Huebschmann*, 34 Wisc. 186; *Kansas City Hotel Co. v. Sigement*,

58 Mo. 176, that different items of an account or claim constitute but one cause of action.

⁴ *Curd v. Lackland*, 43 Mo. 139; *Wynn v. Cory*, 43 Mo. 301; *Gray v. Payne*, 43 Mo. 203; *Peyton v. Rose*, 41 Mo. 257; *Gott v. Powell*, 41 Mo. 416; *Moreau v. Detchemendy*, 41 Mo. 431. See also other cases of the same import, cited *supra*, §§ 92, 79.

⁵ *Henderson v. Dickey*, 50 Mo. 161, 165, per *Wagner J.*; *Duvall v. Tinsley*, 54 Mo. 93.

§ 462. I have thus described the cases in which but one cause of action is alleged, although the many and sometimes conflicting demands for relief may make it appear that several causes of action have been united and mingled together in the pleading. I have stated a general principle which will furnish a certain test for determining all such cases, by ascertaining what allegations contain the "cause of action," and what contain the demands for relief, and by showing the essential nature of each, and the necessary distinctions between them. I shall now proceed to consider the classes of cases in which different causes of action are united either properly or improperly.

IV. The Joinder of Causes of Action arising out of the same Transaction or Transactions connected with the same Subject of Action; Legal meaning of the terms "Transaction" and "Subject of Action."

§ 463. The class which is described by the language of the codes quoted in the above heading is broad, comprehensive, vague, and uncertain. The principal design was undoubtedly to embrace the vast mass of equitable actions and causes of action which could not be classified and arranged in any more definite manner; and the language was properly left vague, so that it might not in any manner interfere with the settled doctrines of equitable procedure and pleading, parties and remedies. Although this general design is very apparent, yet it is no less evident that the author of the clause failed to distinguish between the "cause of action" and the remedy or relief which is sought to be obtained by means of the action. The most frequent application of this class in the actual administration of justice has been and will be to equitable actions: but the language is not confined to them; it includes legal controversies as well. If all the other requisites of the statute are complied with, legal causes of action of the most dissimilar character—for example, contract and tort—may be united in one proceeding, provided they all arise out of the same transaction, or out of transactions connected with the same subject of action. With respect to equitable cases, there cannot be much difficulty; it is always easy to say, and perhaps to see, that the facts constituting the causes of action arise at least in some vague manner from the

same transaction, or from transactions connected with the same subject of action. With respect to legal cases the difficulty is much greater, and is sometimes impossible to be overcome by any logical reasoning. The question will be sometimes presented, not only whether the facts constituting two or more causes of action have arisen from the same transaction, but whether it is possible, in the nature of things, that they could arise in such a manner.

§ 464. A full interpretation of the language used in the codes would result in a general rule applicable to all actions; a rule which should determine when causes of action may and do arise out of the same transaction, or out of transactions connected with the same subject of action. This rule would be obtained, not from an analysis of all possible causes of action, but from a construction of the language used by the legislature; and it would require a legal definition, in an accurate but universal manner, of the terms "transaction," "connected with," and "subject of action." These three terms are the controlling words upon which the whole clause turns; and until the courts shall have defined them in a general and positive manner, all attempts at interpreting the language and deducing any comprehensive and practical rule from it must be futile. Until such a definition is made, each case must be decided upon its own circumstances, in a mere empirical method, so that the confusion and uncertainty will continue, and even increase, in the place of the uniformity and certainty in the practice which the profession and suitors have the right to demand. In short, the courts must break away from the judicial habit which has of late years grown upon them, and must be willing to attempt the discussion and settlement of definitions, principles, and doctrines connected with the reformed procedure, in a general and comprehensive form. Although little aid can be derived from judicial decisions, I shall attempt the extremely difficult task of defining these terms, or, to be more accurate, shall attempt to describe their legal significance and effect, and thus to aid in reaching a general rule or principle by which to determine whether any given cases are embraced within the class designated by the legislature.

§ 465. In corroboration of the statement made above in regard to the general purport and object of the class in question, I quote

the language used by an eminent judge of the New-York Court of Appeals, which, while it contains some unjust remarks upon the authors of the New-York code, is a very pointed and accurate description of the clause and of its immediate design: "In respect to the joinder of causes of action, the provision of the law, so far as is material to the question, now is, that 'the plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of the same transaction or transactions connected with the same subject of action.' The authors of the code, in framing this and most of its other provisions, appear to have had some remote knowledge of what the previous law had been. This provision as it now stands was introduced in the amendment of 1852, because the successive codes of 1848, 1849, and 1851, with characteristic perspicacity, had in effect abrogated equity jurisdiction in many important cases by failing to provide for a union of subjects and parties in one suit indispensable to its exercise. This amendment, therefore, was not designed to introduce any novelty in pleading and practice. Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose, and yet so comprehensive, any rules less liberal than those which have long prevailed in courts of equity."¹ Mr. Justice Comstock plainly regards it unnecessary, if not impossible, to attempt a definition of the terms employed in the passage which he quotes, and would leave each case to be decided upon its own circumstances. This is undoubtedly the easier method for the courts to pursue; but suitors, as well as the profession, have a right to ask from them some rules by which a reasonable degree of certainty as to the correct manner of bringing and conducting causes shall be secured. Regarded as a statutory enactment of the equity doctrine touching the joinder of causes of action in one suit, the clause perhaps requires no special interpretation, since it may be assumed to permit the previous equitable principles and rules of procedure to exist unchanged. In this light alone it is treated by Mr. Justice

¹ N. Y. & N. H. R. R. v. Schuyler, 17 N. Y. 592, 604, per Comstock J.

Comstock in the extract taken from his opinion. But as it applies also to legal actions, and as there were no prior doctrines and rules of practice in courts of law which it reproduces or suffers to remain operative, it does as to them "introduce a novelty in pleading and practice." In order to fix its application in such cases, the meaning of its controlling terms must be determined. There was no prior rule of the common-law procedure which permitted the union of a claim upon contract with another arising from violence to property or person under any circumstances, and yet it is possible that such a combination may be made by virtue of this particular provision.

§ 466. I shall first collect some general observations which have been made by the courts upon the legal import of these terms, and shall, with whatever aid is derived from the judicial interpretation, attempt an independent analysis. A complaint united a cause of action for an assault and battery with one for slander, alleging that the defamatory words were uttered while the beating was in actual progress. To a demurrer for a misjoinder, it was answered that both causes of action arose out of the same transaction. The court disposed of this position in the following manner: "It by no means follows, that, because the two causes of action originated or happened at the same time, each cause arose out of the same transaction. It is certainly neither physically nor morally impossible that there should be two transactions occurring simultaneously, each differing from the other in essential attitudes and qualities. As here, the transaction out of which the cause of action for the assault springs is the beating, the physical force used; while the transaction out of which the cause of action for the slander springs, is not the beating or the force used, but the defamatory words uttered. The maker of a promissory note might, at the very instant of its delivery and inception, falsely call the payee a thief; and yet who would say that the two causes of action arose out of the same transaction? It has been held that a contract of warranty and a fraud practised in the sale of a horse at the same trade did not arise out of the same transaction, so as to be connected each with the same subject of action, and that a complaint containing both causes of action was demurrable.¹ Assault and battery and slan-

¹ Sweet v. Ingerson, 12 How. Pr. 381.

der are as separate and distinct causes of action as any two actions whatever that can be named. The subjects of the two actions are not connected with each other. Each subject is as distinct and different from the other as the character of an individual is from his bodily structure. The question is not whether both causes of action sprang into existence at the same moment of time. Time has very little to do with solving the real question. The question is, Did each cause of action accrue or arise out of the same transaction, *the same thing done*? It is apparent that each cause of action arose, and indeed must necessarily have arisen, out of the doing of quite different things by the defendant, — different in their nature, in all their qualities and characteristics, and inflicting injuries altogether different and dissimilar. The same evidence would not sustain each cause of action, and they may require different answers.”¹ It has been held, however, that the two causes of action under exactly the same circumstances *do* arise out of the same transaction, and may be united in the same complaint.²

§ 467. A complaint contained one cause of action for the breach of a warranty given on the sale of a horse, and a second cause of action for fraudulent representations respecting the quality and condition of the horse made at the same sale, the plaintiff claiming that both causes of action arose out of the same transaction. The court said: “It is somewhat difficult to deter-

¹ *Anderson v. Hill*, 58 Barb. 238, 245, per T. A. Johnson J.; and see *Dragoo v. Levi*, 2 Duval (Ky.), 520, which reaches the same conclusion. It should be noticed that Judge Johnson offers no affirmative definition of “transaction,” except in making “the same transaction” equivalent to “the same thing done.”

² *Brewer v. Temple*, 15 How. Pr. 286; *Harris v. Avery*, 5 Kans. 146. The first of these was a special term decision, and is expressly overruled in *Anderson v. Hill*. I quote from the opinion in the other as an example of the argument on the other side of the question. The defendant had wrongfully arrested the plaintiff, and at the same time called him a thief. The court say: “We think that these facts constitute only one transaction. . . . Our code has abolished all common-law forms of action, and has estab-

lished a system for the joinder of actions more philosophical and complete in itself. It follows the rules of equity more closely than it does those of the common law, one object seeming to be to avoid the multiplicity of actions, and to settle in one suit as equity did, as far as practicable, the whole subject-matter of a controversy. It is probably true that the two causes of action for assault and battery and for slander cannot, under our code, be united, unless both arise out of the same transaction; but we do not know any reason why they should not be united when both *do* arise out of the same transaction.” The court here simply *assumes* that both causes of action did arise out of the same transaction, but does not venture upon any reasons for that opinion. The decision is a mere begging of the question.

mine the precise extent and boundaries of the first subdivision of § 167 of the code, which provides for the joinder of causes of action where they arise out of the same transaction or transactions connected with the same subject of action. In this case the plaintiff first counts in assumpsit on an alleged warranty of the horse, and in the second count for fraud and deceit in wrongfully concealing the defects of the same horse. It may be true that these causes of action arise out of the same transaction, to wit, the bargain for the purchase of the horse; but are they connected with the same subject of action? The subject of the action is either the contract of warranty, or it is the fraudulent concealment of the defects complained of. These causes of action cannot consist with each other. I am inclined to think that the object of the section was to allow the plaintiff to include in his complaint two or more causes of action actually existing, arising out of the same transaction, and when a recovery might be had for both in the same action; and that the joinder must be of those causes of action which are consistent with, not those which are contradictory to, each other.”¹ The judge here fell into at least one palpable error and misreading of the statute. If the causes of action arise out of the same transaction, it is not necessary that they should also be connected with the same subject of action. There are two alternatives: *first*, the causes of action must arise out of the same transaction, that is, *one* transaction; or, *secondly*, they must arise out of transactions which are themselves connected with the same subject of action. When it was conceded by the learned judge that the two causes of action in this case arose out of the same transaction, namely, the bargain for the sale of the horse, he had no room for further argument; the case was practically decided. The real question was, whether they did in fact arise out of the same transaction; whether the negotiation preceding the sale *was* the “transaction” within the legal meaning of the provision. The rule laid down at the end of the citation affords no help in solving the difficulty, if indeed it has any meaning whatever.

§ 468. In a case where the defendants — common carriers —

¹ Sweet v. Ingerson, 12 How. Pr. 381, per Bacon J. What inconsistency exists between these two causes of action? Does the learned judge mean to be understood that a vendor cannot enter into a contract of warranty, and also make false representations at the same sale, and in the same language?

had carried a quantity of wheat of the plaintiff on their boats from Buffalo to New York, the complaint separately stated two causes of action. The first alleged a wrongful conversion of 340 bushels of wheat, and demanded judgment for their value, as damages; the second alleged an overpayment of freight on the shipment to the amount of \$170, and demanded judgment for that sum. In passing upon the question raised by the defendants' demurrer, the court said: "It must be admitted that the first cause of action is for a tort, and that the second is on an implied contract to recover back money paid by plaintiffs under a mistake of facts. But the counsel for the plaintiffs insists that both causes of action arise out of the same subject of action, viz., the transportation of wheat from Buffalo to New York, or arise out of transactions connected with that subject of the action, and are therefore joined under the first subdivision of § 167 of the code. Cases throw but little light on the unmeaning generality of the first subdivision of this section. Now, I do not think the transportation of the wheat to New York is the subject of the plaintiffs' action. The plaintiffs have two causes of action. The subject of the first would be the loss, waste, or wrongful conversion, of the 340 bushels of wheat by the defendants, and their wrongful neglect or act by which the plaintiffs lost their property. The subject of the second cause of action would appear to be the \$170 of the plaintiffs' money, which the plaintiffs overpaid to the defendants on account of freight, and which the defendants ought to have paid back to the plaintiffs. But have both these causes of action, or subjects of action, arisen out of the same transaction, within the meaning of this provision of the code? I do not want to nullify the code, and I have no right to nullify it; and this provision has, or was intended to have, some meaning. Why, then, should I not say that the transaction in this case, out of which have arisen the plaintiffs' two causes of action, and subjects of action, commenced with the shipment of wheat at Buffalo, and has not ended yet, even by the commencement of this action; the plaintiffs' two causes of action being links in the chain of facts containing the transaction, and thus arising out of, or connected with, the same transaction? By the 'subject of action' in this section of the code must be intended, not the subjects of the different counts, or of the several causes of action, but of the action as a unit. To say that by the 'subject of action' is

meant the several causes of action nullifies this provision of the code. To give force and effect to it, it appears to me you must say that it means that the plaintiff can unite several causes of action against the same party, arising out of the same transaction, and nothing more; and you must treat the concluding words, 'or transactions connected with the same subject of action,' as useless and unmeaning surplusage. Upon the whole, I have come to the conclusion that the plaintiff had a right to unite the two causes of action in this complaint; but I have done so, knowing that no reasoning on this point can have much logical precision, or lead to a satisfactory result."¹

§ 469. This opinion, which I have quoted in full, is one of the most elaborate attempts to be found in the reports at an analysis and definition of these terms. Some observations upon it are appropriate here, before passing to the other citations. It is plain that the learned judge labored under a hopeless confusion, both in respect to his notions of the meaning of the important terms, and in respect to his reading of the clause itself. He is completely afloat as to the legal import of "subject of action," constantly treating it interchangeably with "transaction," and, notwithstanding his disclaimer, confounding it with "cause of action." Why, in the one case, is the "subject of action" declared to be the conversion of the wheat, the wrongful act or neglect by which the wheat was lost to the plaintiff, — that is, the very *delict* committed by the defendant, and in the other case declared to be the *money*, — the very physical thing which the plaintiffs had mistakenly paid to the defendants, and which the defendants were under an implied contract to repay? It is self-evident that, if by the term "subject of action" is meant the delict or wrong by which the plaintiffs' primary right of property in their wheat was invaded, it must also mean the wrong in the other case, — that is, the breach of the implied contract to repay the money; and if it denotes, in the one instance, the money which is the subject of the plaintiffs' claim, it must denote the same in the other. But the great error of the learned judge consists in his mistaken reading of the statute. The view of the plaintiffs' counsel, which he repudiates, was certainly simple and intelligible. That view regarded both causes of action as arising

¹ Adams v. Bissell, 28 Barb. 382, 385, per Sutherland J.

out of one and the same transaction, — the transport of the grain, with all of its incidents. After rejecting it, the judge, in fact, returns to this theory at last, and rests his decision upon it. In his discussion, however, he reverses the order of the statute; he treats it as though it required the "subjects of action" to be connected with one "transaction," instead of prescribing that the "transactions" should be connected with the same "subject of action;" and, finding that this construction leads him into difficulties from which there is no escape, he finally pronounces the important clause of the section useless surplusage, to be entirely rejected. I need hardly say that courts have no authority to reject any portion of a statute, unless it be absolutely meaningless. This clause is certainly not thus without meaning. Causes of action may arise from the same transaction, and they may arise from transactions which are connected with the same subject of action, — that is, which have a common point of connection with which they are all united, and which common point is the subject of the action. This, I say, is far from meaningless; on the contrary, it is a simple and plain expression, as far as the language is concerned, when that language is used in its ordinary and popular signification. The difficulty, and the only difficulty, springs from the question, whether the words are thus used in their proper sense, or whether they must receive a special and technical legal interpretation in order to arrive at the legislative intent, and to frame from them a definite rule which shall be applicable to all possible cases. It is an abuse of judicial power to reject an express provision of a statute on the sole ground of a difficulty in understanding and enforcing it.

§ 470. In an action by a judgment creditor against his debtor and an assignee of such debtor to set aside transfers, to recover property, and for other relief, it was said by the court: "What is the subject of the action in this case? It is the restitution of the property of the judgment debtor, whom the plaintiff represents. To entitle himself to this relief, the plaintiff avers in his complaint different transactions out of which his right to a restitution flows."¹ There is here a plain confusion of ideas. The restitution of the debtor's property, which is the relief demanded, is the *object* of the action. If there is any thing connected with this matter clear,

¹ *Palen v. Bushnell*, 46 Barb. 24.

it is that the authors of the code used the terms "subject of action" and "object of the action" to describe different and distinct facts.

§ 471. The general theory of pleading and of actions embodied in the new system was stated with some fulness by the Supreme Court of California, in an action brought against a steamboat company by a passenger to recover damages. The plaintiff had purchased a ticket from San Francisco to San Juan, being led to believe, by public advertisements of the defendants, that the vessel landed at the latter place. She was carried on to Panama, the boat not stopping at San Juan, and was subjected to many personal discomforts and injuries, and also suffered consequential pecuniary losses and damage. The complaint was in the form of an action for deceit, rather than on the contract, and contained allegations of false and fraudulent representations. In respect to this complaint, the court pronounced the following opinion: "Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the courts to assist as far as possible in the accomplishment of this object, and it should not be frittered away by the application of rules which have no legitimate connection with the system. The provisions for avoiding a multiplicity of suits are to be liberally and beneficially construed; and we see no reason why all matters arising from, and constituting part of, the same transaction, should not be litigated and determined in the same action. Causes of complaint differing in their nature, and having no connection with each other, cannot be united; but the object of this rule is to prevent the confusion and embarrassment which would necessarily result from the union of diverse and incongruous matters, and it has no application to a case embracing a variety of circumstances, so connected as to constitute but one transaction. . . . Every action under our practice may be properly termed an action on the case; and it would seem that every ground of relief which can be regarded as a part of the case may with propriety be included in the action. . . . The plaintiffs have brought their suit upon the whole case to recover damages, not only for the breach of the contract, but for the wrongs and injuries committed by the owners and agents of the defendants in that connection. The defendants are liable for all the damages resulting from these causes; and there

is certainly no impropriety in adjusting the whole matter in one controversy."¹ The section found in all the codes defining a "counterclaim" contains the expressions "transaction" and "connected with the subject of action," used in the same sense as in the passage now under consideration. In a few of the decisions which have been based upon that section, there is some approach towards a general interpretation of these phrases. The cases are collected in the succeeding chapter, in the section which treats of the counterclaim, and may be consulted for whatever light they throw upon the present discussion.²

§ 472. It is plain that little real help can be obtained from the foregoing judicial explanations, and we must return to the very language of the statute itself. This language must be carefully studied, and the proper force and effect given to all its words. In order that different causes of action may be united, they must arise out of a transaction, or out of transactions. Nothing is said about their being connected with or arising out of the same "subject of action." There are two alternatives only: First, these different causes of action may arise out of the same transaction, — that is, out of *one*; or, secondly, they may arise out of different transactions; but in that case these transactions must be connected with the same "subject of action." The words "arise out of" are important and emphatic. They indicate a sequence of cause and effect, so that the causes of action must result as consequences from, or be produced by, the transactions. It is plain that there must be a close connection between the transaction, as the origin, and the causes of action, as the products.

§ 473. "Transaction" is defined by Worcester as "the act of transacting or conducting any business; negotiation; management; a proceeding." We must recur to the definition of cause of action already given. It includes the plaintiff's primary right which has been invaded, and the wrongful act or default — the delict — of the defendant by which the right is broken. In order that causes of action may arise out of a transaction, there must, therefore, be a negotiation, or a proceeding, or a conduct of business, between the parties, of such a nature that it produces, as

¹ Jones v. Steamboat Cortes, 17 Cal. 487, 497, per Cole J.

² See Chap. IV. sect. 6.

necessary results, two or more different primary rights in favor of the plaintiff, and wrongs done by the defendant which are violations of such rights. The proceeding, or negotiation, or conduct of business, must, of course, be a unit, one affair, or else it would not be a single transaction; and yet it must be in its nature complex, for it must be the origin of two or more separate primary rights, and of the wrongs which violate them. In order that this may be so, the facts from which the different primary rights flow *must be parts of, or steps in, the transaction*; and, for the same reason, the wrongful acts or omissions of the defendant must be parts of the same transaction. If a single transaction — that is, a single, continuous, and complex proceeding, or negotiation, between the parties — is analyzed and reduced into its series of acts and defaults, and some of these acts are the facts from which spring one primary right in favor of the plaintiff, and other acts are the facts from which spring a different primary right in his favor, and others still are the violations or breaches of these rights, these two causes of action do truly arise out of the same transaction.

§ 474. It is clear that every event affecting two persons is not necessarily a "transaction" within the meaning of the statute; indeed, the word as used in common speech has no such signification. "Transaction" implies mutuality, something done by both in concert, in which each takes some part. Much less can it be said, that, because two events occur to the same persons at the same time, they are necessarily so connected as to become one transaction. The case cited above, in which a cause of action for an assault and battery and one for a slander were united, illustrates this statement. Two events happened simultaneously, the beating and the defamation, but neither was a "transaction" in any proper sense of the word. The wrong which formed a part of one cause of action was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and different wrongs. The only common point between the causes of action was one of time; but this unity of time was certainly not a "transaction." Much of the difficulty in construing this language has resulted, I think, from a failure to apprehend the true nature of a "cause of action," from a forgetfulness that it includes two factors, — the primary right and

the wrong which invades it. A "cause of action" cannot be said to "arise out of" an event when the event produces or contains but one of these factors, — the delict or wrongful act.

§ 475. The same analysis applies also to the remaining portion of the clause, the sole difference being that the causes of action arise out of different transactions instead of one. The common tie between the causes of action in that case is, that the transactions themselves are connected with the same "subject of action." What is meant by this term? It cannot be synonymous with "cause of action." This appears from making the substitution, since the result would be, "causes of action may be united when they arise out of transactions connected with the same cause of action;" which is an absurdity, a mere statement in a circle. "Subject of action" must, therefore, be something different from "cause of action." It is also different from "object of the action." The object of the action is the thing sought to be attained by the action, the remedy demanded and finally awarded to the plaintiff. Causes of action cannot arise out of transactions connected with the "object of the action," because that object is something in the future, and could have had no being when the transactions took place out of which the causes of action arose. As the causes of action arise out of certain transactions, and as these transactions are connected with a "subject of action," it is plain that this subject must be in existence simultaneously with the transactions themselves, and prior to the time when the causes of action commence. This fact also shows that the "subject" must be something other than the cause of action. The phrase was not used in legal terminology prior to the code, but another one very similar to it was in constant use, and had acquired a well-defined meaning; namely, "*subject-matter of the action.*" Thus the rule is familiar, that courts must have jurisdiction of "the subject-matter of the action," as well as over the parties. Courts might have the power in a proper case to grant any kind of relief, legal or equitable, and to entertain any form of proceeding, and yet not have jurisdiction over some particular "subject-matter." The term "subject of action," found in the code in this and one or two other sections, was doubtless employed by its authors and the legislature as synonymous with, or rather in the place of, "subject-matter of the action." I can conceive of no other interpretation which will apply to the phrase and meet all the require-

ments of the context. "Subject-matter of the action" is not the "cause of action," nor the "object of the action." It rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted. It is possible, therefore, that several different "transactions" should have a connection with this "subject-matter," or, what seems to me to be the same thing, with this "subject of action." The whole passage is, at best, a difficult one to construe in such a manner that any explicit and definite rule can be extracted from it. I remark, in bringing this analysis of the language to a close, that the latter clause of the subdivision — "or transactions connected with the same subject of action" — can probably have no application to legal causes of action, and can only be resorted to in practice as describing some equitable suits which involve extremely complicated matters. In fact, Mr. Justice Comstock's position is doubtless correct, that the entire subdivision finds its primary and by far most important application to equitable rather than to legal proceedings.

§ 476. Although the courts have generally refrained from any discussion of this clause, they have had frequent occasion to invoke its aid; and the following cases will furnish some examples of judicial decisions based upon it. The causes of action united in the same complaint or petition were held to have arisen out of the same transaction, where one was for the recovery of the possession of land, and the other was for the value of its occupation by the defendant;¹ for an accounting and payment of the balance found due, and for the surrender up of securities;² for injuries to the person and for those to the property of a passenger, committed by the wrongful acts and frauds of a steamboat company on the same voyage;³ where the owner of stereotype plates of a book alleged a breach of defendant's contract to furnish paper and print a book therefrom, and also injuries negligently done to the plates themselves while in the defendant's possession;⁴ detaining the plaintiff's chattels, and wrongfully and negligently injuring them while thus detained;⁵ an action by a judgment creditor against his debtor and another to recover back money

¹ *Armstrong v. Hinds*, 8 Minn. 254. 487, 497. See, however, *Grant v. McCarty*, 38 Iowa, 468.

² *Montgomery v. McEwen*, 7 Minn. 351.

⁴ *Badger v. Benedict*, 4 Abb. Pr. 176.

⁵ *Smith v. Orser*, 43 Barb. 187.

³ *Jones v. Steamboat Cortes*, 17 Cal.

wrongfully paid as usury to such person by the debtor, to compel this assignee to account for actual securities placed in his hands by the debtor, and to set aside certain transfers of personal property made by the debtor; ¹ an action in which the plaintiff sought to recover the agreed price in a contract for building a house, damages caused by the defendant's delay to have the premises ready in time for the work to go on, and the price of extra work and materials, and finally to set aside, on the ground of fraud an award made in reference to certain of the matters in dispute; ² an action to recover damages for the conversion of goods by the defendant, a common carrier, and to recover back money mistakenly paid as freight for the same goods; ³ where lands incumbered by an outstanding mortgage had been conveyed by a warranty deed, and the grantee therein brought an action against the grantor and the holder of the mortgage, and prayed a judgment fixing the amount due upon the mortgage, if any, and directing the same to be delivered up and cancelled upon payment by the plaintiff of the amount so ascertained, and ordering the grantor thereupon to repay that sum to the plaintiff; ⁴ action against a constable and the sureties upon his official bond, alleging the issue of an execution to such officer and a levy by him upon property of the judgment debtor sufficient to have made the amount due, a neglect to return the execution, the receipt and collection of the money, and refusal or neglect to pay over the same to the plaintiff; ⁵ where the plaintiff alleged that he had placed \$100 in the defendant's hands for the purpose of entering an eighty-acre lot in the plaintiff's name, at the expected price of \$1.25 per acre; that the defendant thereupon entered the lot in his own name, but paid therefor only \$10, and converted the residue of the money to his own use; and demanded judgment for the \$90 and interest, and also for a conveyance of the land to himself; ⁶ an action to recover a specified sum due upon a written contract, and damages for the breach of certain covenants in the same instrument, and also to compel the specific performance of

¹ *Palen v. Bushnell*, 46 Barb. 24. It might, perhaps, have been better to say that there was but one cause of action.

² See *v. Partridge*, 2 Duer, 468.

³ *Adams v. Bissell*, 28 Barb. 382, 385.

⁴ *Wandle v. Turney*, 5 Duer, 661. Although Bosworth J. says the causes of

action all arose out of the same transaction, yet, upon the principles already stated in the text, there was actually but one cause of action.

⁵ *Moore v. Smith*, 10 How. Pr. 361.

⁶ *Callaghan v. McMahan*, 33 Mo. 111.

a covenant to convey land contained therein;¹ where one cause of action was for the defendant's deceit practised in the sale of oil leases to the plaintiff, and the other was for money had and received, being the price paid by the plaintiff in the same sales.² The owner in fee of land having been induced by the defendant's fraud to convey the same by a deed in which the wife joined, the grantor and his wife brought a joint action to recover damages for the deceit. The New York Court of Appeals held that the husband had a cause of action for the loss of the land which he owned in fee; that the wife had a cause of action for the loss of her inchoate dower right; that they could recover one joint judgment as a satisfaction for both claims; and, finally, that the two causes of action were properly united, since they arose out of the same transaction, — namely, the bargaining and sale of the premises and the fraudulent representations made therein by the defendant.³ Several of the cases cited in the last preceding subdivision of this section might perhaps be regarded as instances of causes of action arising out of the same transaction; they certainly would be so if they were to be considered as embracing more than one cause of action.⁴

§ 477. The following are examples of causes of action contained in the same complaint or petition which have been held not to arise out of the same transaction: for an assault and battery and for a slander, although committed simultaneously;⁵ for

¹ *Gray v. Dougherty*, 25 Cal. 266.

² *Woodbury v. Delap*, 1 N. Y. S. C. 20; s. c. 65 Barb. 501. The first count set out the sale and the deceit and the damages; the others, for money had and received, alleged that the money had been had and received by the defendant "as above stated." This, it was held, incorporated into the latter counts the averments of the former, and showed that all arose out of the same transaction.

³ *Simar v. Capaday*, 53 N. Y. 298, 305, per Folger J. The complaint was not framed at all upon the theory which the court adopted in making this decision. It did not purport to set forth two separate causes of action; it was a joint complaint, and alleged a joint cause of action in favor of the plaintiffs, and demanded a single joint judgment. The peculiar feature of the decision is that which sustains a single

judgment for one sum as damages in satisfaction of both demands, although the case is expressly based upon the doctrine that there were separate and distinct causes of action. Assuming that the court was correct in this position, they plainly both arose out of the same transaction.

⁴ See *supra*, §§ 459, 460, and especially *Bidwell v. Astor Ins. Co.*, 16 N. Y. 268; *Phillips v. Gorham*, 17 N. Y. 270; *Laub v. Buckmiller*, 17 N. Y. 620; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 857; *Lattin v. McCarty*, 41 N. Y. 107; *Howe v. Peckham*, 10 Barb. 656; *Blake v. Van Tilborg*, 21 Wisc. 672; *Fish v. Berkey*, 10 Minn. 199.

⁵ *Anderson v. Hill*, 53 Barb. 238, 245; *Dragoo v. Levi*, 2 Duv. (Ky.) 520. But, *per contra*, see *Harris v. Avery*, 6 Kans. 146; *Brewer v. Temple*, 15 How. Pr. 286.

a breach of a warranty of soundness given on the sale of a horse, and for fraudulent representations as to the soundness made at the same sale; ¹ a claim by the plaintiffs as next of kin and legatees of A., two of the defendants being A.'s executors, and a claim by them as legatees of B., one of the defendants being B.'s executor, the action being for an account and settlement of both estates.²

§ 478. When the plaintiff unites two causes of action which can only be joined because they arise out of the same transaction, or out of transactions connected with the same subject of action, the facts showing such common origin or connection must be averred, so that the court may see whether the joinder is proper. A mere general allegation that the causes of action all arose out of the same transaction, is of no avail, and would be surplusage.³

V. Instances in which the proper Joinder of Causes of Action is connected with the proper Joinder of Defendants; Discussion of the provision that all the Causes of Action must affect all of the parties.

§ 479. Questions relating to the uniting of causes of action may be presented in two forms: In whatever one of the enumerated classes they fall they may (1) be against the single defendant, or the several defendants all equally liable, — perhaps jointly liable, — in which case the inquiry has to do solely with the joinder of the causes of action themselves, and is not concerned with the joinder of the defendants; or (2) they may be against several defendants unequally and differently liable, one cause of action affecting a portion of the defendants more directly and

¹ Sweet v. Ingerson, 12 How. Pr. 381. In accordance with the principles maintained in the text, the two causes of action in this case clearly arose out of the same transaction; indeed, a more illustrative example could hardly be found among purely legal actions.

² Viall v. Mott, 87 Barb. 208. The Supreme Court of North Carolina, in a very recent case, seems to deny any operative force whatsoever to the first clause of the section under consideration, which, as it occurs in the code of that State, is

identical with the one given in the text. Although the language used by the court is only a dictum, it is a strong expression of opinion that no causes of action can be united by reason of that particular provision unless they are embraced within some of the other classes mentioned by the section. See N. C. Land Co. v. Beatty, 69 N. C. 829, 384.

³ Flynn v. Bailey, 50 Barb. 73. See Woodbury v. Delap, 1 N. Y. S. C. 20; 65 Barb. 501.

substantially than it does others. In such case the inquiry has to do with the joinder of the defendants as well as with the union of the causes of action. I shall, in the present subdivision, examine the latter of these cases. It is required by all the codes as a prerequisite to the uniting of different causes of action, that, notwithstanding they may all belong to the same class, they must affect all the parties to the action. The only exception mentioned in any statute is the action to foreclose a mortgage.¹

§ 480. While the causes of action thus united must affect all of the parties, it is not necessary that they should affect them all equally or in the same manner.² If equality and uniformity were required, a large part of the equity jurisdiction would be swept away at one blow; for it is the distinguishing feature of that system that all persons having *any* interest in the subject-matter of the controversy or in the relief granted should be made parties, however various and unequal their interests may be. Indeed, equality of right or of liability was not essential in all common-law actions. It was only when the proceeding was in form joint that this equality was indispensable according to legal conceptions. The provision of the codes has not changed any of these former doctrines; it simply enacts in one statutory and comprehensive form the principle which controlled the courts, both of law and equity, under the former practice. It leaves an equitable action to be governed by the same rules as to parties which controlled it when equity was a distinct department, and it extends the theory at least to legal actions as well. The practical effect of this clause in the statute will be best learned from an examination of the cases in which it has been applied, and from the judicial construction which has been thereby put upon it. Those which are quoted first in order pronounce against the propriety of the union made by the plaintiff, because the causes of action did not affect all the parties.

§ 481. The owner of a tract of land had made O. his agent for the purpose of selling it, and O. had sold the land to S., who also stood in a fiduciary relation to the owner, and S. had conveyed

¹ This exception, in fact, confounds "relief" with "cause of action." It simply permits defendants to be joined against whom some special relief is demanded, and is therefore entirely unnecessary. In every

such suit there is only *one* cause of action, unless a common-law action on the note or bond is combined with the foreclosure.

² Vermeule v. Beck, 15 How. Pr. 833.

portions of the land to different purchasers. The original owner thereupon brought an action against O. and S., charging fraud and a violation of their fiduciary duty against both. The complaint demanded a judgment of damages against O. for his deceit, and against S. an account and payment of all the proceeds and profits that he had or might have made from his own sales, and a reconveyance of the portion yet remaining unsold. The New York Court of Appeals held that the causes of action were improperly united; and, as its opinion is instructive, I quote from it at some length. "The plaintiff has elected to regard S. as his trustee, and the complaint as to him and the decree proceed on this basis. The plaintiff therefore elects to affirm the sale as to S. He cannot *uno flatu* affirm it as to him, and disaffirm it as to the defendant O. It is difficult to see how under the provision of § 167 of the code these causes of action may be united in the same complaint. Although it may be said that both causes of action arise out of the same transaction, namely, the sale of the plaintiff's land to the defendant S., yet the cause of action against O. is for an injury to the plaintiff's property, while that against S. is a claim against him as a trustee by operation of law. The causes of action joined in the complaint do not affect both of the parties defendant. O. is not affected by nor in any way responsible for S.'s acts as plaintiff's trustee, and the complaint does not profess to make him liable therefor. So S. is not sought to be made responsible for the fraudulent acts of O. On the plaintiff's own showing, he has separate and distinct causes of action against each of the defendants which cannot be joined under the code."¹

§ 482. The same doctrine was asserted and ruling made in the following cases, the causes of action being held improperly united in each because they did not affect all of the parties: Where one cause of action was on a judgment against the defendant and two others, a second on a judgment against the defendant and one other, while a third was on a judgment against the defendant alone;² where the first cause of action was against a husband and wife for a slander by the wife, and the second against the husband for his own slander;³ an action against a husband and wife on a contract made by both in the wife's business, where a personal judgment was demanded against him, and a judgment

¹ Gardner v. Ogden, 22 N. Y. 827, 840, per Davies J.

² Barnes v. Smith, 16 Abb. Pr. 420.

³ Malone v. Stilwell, 15 Abb. Pr. 421. And see Dailey v. Houston, 58 Mo. 361, 366.

to enforce the demand against the wife's separate estate ;¹ where the plaintiff's agent, with whom certain securities had been deposited, had transferred them in violation of his duty to various assignees, and a single action was brought against him and all these transferees to set aside the assignments and to recover the bonds or their proceeds ;² an action by a reversioner against the tenant for life and the occupant to recover damages for injuries done by them to the land, the complaint containing a cause of action against *one* defendant for cutting and removing timber, a second against *both* for the same acts, and a third against *both* for removing fire-wood already cut ;³ an action for deceit, in which one count of the complaint alleged fraudulent acts against a part of the defendants, and other counts charged similar acts against all ;⁴ where damages were claimed from the owner of a city lot for making an excavation in a street, into which the plaintiff fell, and from the city for permitting the street to be broken up ;⁵ an action against two defendants to recover damages for the flowing of plaintiff's lands, the complaint alleging in the first count that one defendant erected a dam in the north branch of a certain river, and in the second count that the other defendant constructed a dam in the south branch of the same stream, by the combined effects of which obstructions the injury was done ;⁶ an action against two defendants, in which the claim against one was for goods sold and delivered, and that against the other was on his promise to pay the price thereof ;⁷ an action against a public officer and the sureties on his official bond for a breach thereof, the complaint containing also a cause of action against the officer alone for damages caused by a distinct and different negligent act ;⁸ a cause of action against A. B. and C. for money loaned to them, and one against A. D. and E. on a note given by them as collateral security for the same loan.⁹

¹ *Palen v. Lent*, 5 Bosw. 713.

² *Lexington, &c. R. R. v. Goodman*, 15 How. Pr. 86. This was a special term decision, and is therefore not entitled to much authority. The case is clearly in principle identical with the ordinary creditor's suit.

³ *Rodgers v. Rodgers*, 11 Barb. 595.

⁴ *Wells v. Jewett*, 11. How. Pr. 242.

⁵ *Trowbridge v. Forepaugh*, 14 Minn. 133.

⁶ *Lull v. Fox & Wisc. Imp. Co.*, 19 Wisc. 100, 102.

⁷ *Sanders v. Clason*, 13 Minn. 379. See also cases in regard to guarantors, *supra*, § 306.

⁸ *State v. Kruttschnitt*, 4 Nev. 178; *Ghirardelli v. Bourland*, 32 Cal. 585. And against the sureties on an administrator's bond for a breach thereof, and against the administrator himself for a violation of his trust. *Howse v. Moody*, 14 Fla. 59, 64, 65.

⁹ *Farmers' Bank v. Bayliss*, 41 Mo. 274. And see *Lane v. State*, 27 Ind. 108.

§ 483. The causes of action must not only affect all the defendants, but all the plaintiffs as well, the provision of the codes applying equally to both parties.¹ Thus an action by three persons having entirely distinct and separate claims against the defendant for work and materials, brought to foreclose their individual mechanic's liens on their debtor's house, was held improper;² and where six persons, owners of distinct and separate parcels of land through which a stream ran, each being entitled to the use of the water as it passed through his land, joined in a suit to restrain the defendant from diverting the entire stream at a point above all their premises, the Supreme Court of Nevada condemned the complaint as improperly uniting the causes of action and the plaintiffs.³ In an action to recover possession of land brought by two plaintiffs, the complaint contained two counts: the first averred a title to the premises in one of the plaintiffs, while the second alleged a different and even hostile title in the other. A demurrer to this complaint was sustained, on the ground that the two causes of action did not affect both of the plaintiffs. "The former practice of naming different lessors of the plaintiff in ejectment, and afterwards of uniting different plaintiffs who claim under distinct and hostile titles, has been abolished by the code. "The action to recover possession of land now stands on the same footing precisely in respect to parties and the union of causes of action with all other actions."⁴

§ 484. Causes of action to recover possession of different chattels from different defendants cannot be joined in the same suit.⁵ Nor can a cause of action against a trustee to compel the conveyance of the trust property be united with a cause of action against an administrator on a demand growing out of the same property.⁶ A cause of action against an executor, administrator,

¹ Where a husband and wife sued for an assault and battery upon the wife, and the petition set forth a claim for the injuries sustained by the wife for which both must sue, and also a claim for the loss of her services, for which he alone must sue, two causes of action were held to be improperly united. *Dailey v. Houston*, 58 Mo. 361, 366.

² *Harsh v. Morgan*, 1 Kans. 298, 299.

³ *Schultz v. Winter*, 7 Nev. 180. For contrary cases, see *supra*, § 269 (n.) 1.

⁴ *Hubbell v. Lerch*, 62 Barb. 295; 297,

per T. A. Johnson J.; *St. John v. Pierce*, 22 Barb. 362; *Hubbell v. Lerch*, 58 N. Y. 237, 241.

⁵ *Robinson v. Rice*, 20 Mo. 229.

⁶ *McLaughlin v. McLaughlin*, 16 Mo. 242. The following cases are additional illustrations of the rule that the causes of action must affect all the parties. *Cheely's Administrator v. Wells*, 33 Mo. 106; *Liney v. Martin*, 29 Mo. 28; *Stalcup v. Garner*, 26 Mo. 72. A cause of action to recover possession of one parcel of land with damages for withholding the same,

or trustee, in his representative character, cannot be united with one against the same individual personally. The doctrine was recently stated by the New York Court of Appeals, as the result of an elaborate examination of the authorities: "The following principles are settled by these authorities: 1. That, for all causes of action arising upon contract made by deceased in his lifetime, an action can be maintained against the executor or administrator *as such*, and the judgment would be *de bonis testatoris*, or *intestatoris*. 2. That in all causes of action, where the same arise upon a contract made after the death of the testator or intestate, the claim is against the executor or administrator personally, and not against the estate, and the judgment must be *de bonis propriis*. 3. That these different causes of action cannot be united in the same complaint."¹

§ 485. Under the provisions of the Indiana code an action was sustained against a husband and wife, brought by a creditor of the husband to recover a judgment for the amount of the demand against him, and to charge certain land held by the wife under an implied trust for her husband, with a mechanic's lien which accompanied the demand;² and also an action against a husband and wife, which was brought to obtain a judgment against him for the price of goods sold and delivered, and also to set aside his deed of land fraudulently conveyed to her, so as to let in the lien of the judgment when recovered.³

§ 486. The questions under consideration, in their application to equitable actions, were thoroughly and ably discussed by the Supreme Court of California in the case of *Wilson v. Castro*,⁴ and

it has been held, cannot be joined with a similar cause of action in respect to another parcel, *sed qu.* *Holmes v. Williams*, 16 Minn. 164, 169; nor can a claim for a specific performance against A. be joined with a claim to recover possession of land against B., *Fagan v. Barnes*, 14 Fla. 53, 56; nor can a cause of action for fraud against one defendant be united with a cause of action upon contract against another, *Van Liew v. Johnson*, 6 N. Y. S. C. 648; *N. C. Land Co. v. Beatty*, 69 N. C. 329.

¹ *Ferrin v. Myrick*, 41 N. Y. 315, 319-322, per Hunt C. J.; *Austin v. Munro*, 47 N. Y. 360, 364, 365, per Allen J.; *Austin v. Munro*, 4 Lans. 67. See, *per contra*,

Tradesman's Bank v. McFeely, 61 Barb. 522, decided in the face of *Ferrin v. Myrick*. But a claim against the defendant as a stockholder, to recover a demand due from the corporation, may be joined with a claim against him as a trustee of the company for the same demand, both being based upon a statute. *Wiles v. Suydam*, 6 N. Y. S. C. 292, citing *Durant v. Gardner*, 10 Abb. Pr. 445; 19 How. Pr. 94; *Sipperly v. Troy & B. R. R.*, 9 How. Pr. 83; *Dickens v. N. Y. Cent. R. R.*, 18 How. Pr. 228.

² *Lindley v. Cross*, 31 Ind. 106.

³ *Frank v. Kessler*, 30 Ind. 8.

⁴ *Wilson v. Castro*, 31 Cal. 420.

I shall close this subdivision with an extract from the opinion. After a statement of the general rules and doctrines of equity in relation to parties, the learned judge proceeds to discuss the question as to the joinder of causes of action in connection with the union of the defendants, or, to adopt the nomenclature used by equity courts, the subject of "*multifariousness*." "A bill in equity is said to be 'multifarious' when distinct and independent matters are joined therein, — as, for example, the uniting of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature, against several defendants. But the case of each particular defendant must be entirely distinct and independent from that of the other defendants, or the objection cannot prevail; for, as said by Judge Story, 'The case of one may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness could not be allowed to prevail. So it is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matter in the suit, and they are connected with the others.'¹ The same author lays it down that 'To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: *first*, the different grounds of suit must be wholly distinct; *secondly*, each ground must be sufficient as stated to sustain a bill; if the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction, or series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the objection does not apply.'² When the point in issue is a matter of common interest among all the parties to the suit, though the interests of the several defendants are otherwise unconnected, still they may be joined. In *Salvidge v. Hyde*,³ Sir John Leach V. C. said: 'If the objects of the suit are single, but it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily happens that such different persons must be brought before the court in order

¹ Story's Eq. Pl., §§ 271, 271 a.

² Ibid. § 271 b.

³ *Salvidge v. Hyde*, 5 Madd. Ch. R. 188.

that the suit may conclude the whole subject.' In *Boyd v. Hoyt*,¹ Mr. Chancellor Walworth laid down the same doctrine in substantially the language used by Sir John Leach in *Salvidge v. Hyde*; and Mr. Daniel, in his excellent work,² says, in reference to the doctrine held in *Salvidge v. Hyde*, there is no doubt that the learned judge stated the principle correctly, though in the application of it he went, in the opinion of Lord Eldon, too far.³ In *Whaley v. Dawson*,⁴ Lord Redesdale observed that in the English cases, when demurrers, because the plaintiff demanded in his bill matters of distinct natures against several defendants not connected in interest, have been overruled, there has been a general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct. In such cases the court proceeds on the ground of preventing multiplicity of suits, when one general right is claimed by the plaintiff against all the defendants; and so in *Dimmock v. Bixby*,⁵ the court held that when one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights, the bill of complaint is not multifarious. In the elaborate case of *Campbell v. Mackay*,⁶ Lord Cottenham held that when the plaintiffs have a common interest against all the defendants in a suit, as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of the defendants being subject to distinct liabilities in respect to different branches of the subject-matter will not render the bill multifarious. In the same case his lordship observed that it was utterly impossible upon the authorities to lay down any rule or abstract proposition as to what constitutes multifariousness which can be made universally applicable. The only way, he said, of reconciling the authorities upon the subject, is by adverting to the fact, that although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two kinds, one of which, properly speaking, is on account of a misjoinder of causes of action; that is to say, uniting claims of so different a character that

¹ *Boyd v. Hoyt*, 5 Paige, 78.

² 1 Daniell's Ch. Pl., p. 386.

³ 1 Jac. R. 151.

⁴ *Whaley v. Dawson*, 2 Sch. & Lef.

⁵ *Dimmock v. Bixby*, 20 Pick. 368.

⁶ *Campbell v. Mackay*, 1 Myl. & Cr. 608.

the court will not permit them to be litigated in one record, even though the plaintiff and defendants may be parties to the whole transactions which form the subject of the suit. The other of which, as applied to a bill, is that a party is brought as a defendant upon a record, with a large portion of which, and with the case made by it, he has no connection whatever. A demurrer for such a cause is an objection that the complaint sets forth matters which are multifarious; and the real cause of objection is, as illustrated by the old form of demurrer, that it puts the parties to great and useless expense, — an objection which has no application in a case of mere misjoinder of parties. Upon this subject Judge Story says: ‘In the former class of cases, where there is a joinder of distinct claims between the same parties, it has never been held as a distinct proposition that they cannot be united, and that the bill is of course demurrable for that cause alone, notwithstanding the claims are of a similar nature, involving similar principles and results, and may therefore without inconvenience be heard and adjudged together. If that proposition were to be established and carried to its full extent, it would go to prevent the uniting of several demands in one bill, although the parties were liable in respect to each, and the same parties were interested in the property which may be the subject of each. Such a rule, if established in equity, would be very mischievous and oppressive in practice, and no possible advantage could be gained by it.’¹ He states in conclusion the result of the principles of the cases to be,² ‘That where there is a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit; and further, that where the interests of the plaintiffs are the same, although the defendants may not have a coextensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them.’”³

§ 487. The observations of Mr. Calvert upon the distinction between “subject” and “object” of the action, and upon the

¹ Story’s Eq. Pl., §§ 531, 532.

² Ibid. §§ 533, 534.

³ Wilson v. Castro, 31 Cal. 420, 423-431, per Currey J.

sense in which the former term is used in the common method of stating the general rules of equity procedure, are so valuable and instructive, that I shall quote them, with some condensation. They apply as well to the doctrine of parties heretofore discussed as to the particular language of the codes under consideration in the present section. After laying down the equity rule as to parties in the customary form adopted by several eminent judges, in which the necessity or propriety of their being joined is made to depend upon their interest in the "subject" of the suit,¹ he proceeds:² "The expression 'subject of suit' may mean one of two things,—either the fund or estate respecting which the question at issue has arisen, or else that question itself. For instance, in a foreclosure suit it may mean either, in the first sense, the mortgage debt or mortgaged premises, or, in the second sense, the question whether a foreclosure ought or ought not to take place." He goes on to show by citations from their judgments that in the cases quoted below, Lord Eldon and Sir William Grant used the phrase in the first sense, and adds: "If the words 'subject of suit' were taken in that very extensive meaning in which Lord Eldon and Sir William Grant used them, the general rule as laid down by them would be inconsistent with several distinctions which are firmly established." This statement he illustrates by a reference to many instances in which it is well settled that persons who are directly interested in the property, fund, or estate affected by the action, need not be made parties,—as for example in an action by or against trustees, the *cestuis que trustent* are under some circumstances neither necessary nor proper parties.³

§ 488. Upon these premises Mr. Calvert proceeds to develop his own views as follows: "The rule, then, which has been stated in these cases in reference to the 'subject of the suit,' meaning thereby the estate or fund on which the question at issue has arisen, does not appear to be adapted to general application. It must be taken in connection with other authorities which will now be quoted." The authorities then cited by him, while using the same phrase, "subject of the suit," make the necessity of a person's

¹ See Lord Redesdale, Plead. 164, 170; Lord Eldon in *Cockburn v. Thompson*, 16 Lord Hardwicke in *Poor v. Clarke*, 2 Atk. 515; Lord Thurlow in *Anon.* 1 Ves. 29; ² Calvert on Parties, p. 5.

Sir William Grant in *Palk v. Clinton*, 12 Ves. 58; *Wilkins v. Fry*, 1 Meriv. 262; ³ *Ibid.* pp. 6, 7, 8.

being joined as a party to depend upon his interest *in the questions involved in the litigation, and the effect which the decree will have upon that interest*. This doctrine was tersely expressed by Lord Lyndhurst: "The general rule is, that all persons who are interested in the *question* must be parties to a suit instituted in a court of equity."¹ He thus sums up the matter: "Not all concerned in the *subject-matter* respecting which a thing is demanded, but all concerned in the *very thing which is demanded, the matter petitioned for in the prayer of the bill*, in other words, the *object of suit*, should be made parties in equity. Upon a combination of all these authorities, it is proposed to state the general rule in the following words: All persons having an interest in the *object* of the suit ought to be made parties."²

§ 489. This theory is open to a very plain criticism. Assuming that "subject of the suit" may be used in the two senses mentioned by Mr. Calvert, and conceding that the rule requiring all persons interested in the "subject," taken in the first of these senses, to be made parties, would not be universally correct, the natural conclusion would be that the phrase "subject of the suit," as found in the general rule, should be taken in its second sense. The author seems in his argument to reach this position; but in the very act of arriving at this result he confounds this second sense of the expression with a very different thing, — the *object* of the suit. The "object of the suit" is, as he states it to be, the very relief prayed for by the bill, the remedy asked and granted; but this relief or remedy is certainly not identical with the "subject of the suit" used in its secondary meaning. Taking his illustration of the foreclosure suit, the "subject" may be the mortgage debt or the mortgaged premises on the one hand, or the question whether a foreclosure ought or ought not to take place on the other. The latter is clearly not the same as the sale of the land and the payment of the debt out of the proceeds, which is the only *object* of the action. It would seem very clear then, by the author's own argument, that the final conclusion which he reaches is not derived from his premises nor established by his reasoning. The authorities agree, in one form of expression or

¹ *Small v. Atwood*, Younge, 458. The other *dicta* cited by Mr. Calvert are Lord Loughborough in *King v. Martin*, 2 Ves. 648; Lord Eldon in *Fenton v. Hughes*, 7 Ves. 288; Sir T. Plumer in *Whitworth v. Davis*, 1 Ves. & B. 550; Sir John Leach in

Smith v. Snow, 8 Madd. R. 10; *Lloyd v. Lander*, 5 Madd. R. 289; Lord Hardwicke in *Poore v. Clarke*, 2 Atk. 515; *Com. Dig. Tit. Chan.*, E. 2.

² Calvert, pp. 10, 11.

another, that all persons materially interested in the "subject of the suit" should regularly be made parties. The "subject of the suit" may be the fund, estate, or property, in respect of which the action is maintained; and it is true, that, in a very large number of instances, — in fact, in a very large majority of instances, — all the persons interested in this fund or estate should be parties in an equity suit. But the "subject of the suit" may be regarded as describing the questions respecting this fund or estate which are involved in the litigation; and if the rule as just stated is too broad to be of absolutely universal application, it is certainly true that all persons materially interested in these questions ought to be joined as parties.

§ 490. Let us apply Mr. Calvert's analysis of the term to the language found in the codes. In equitable actions there is generally, if not quite always, a fund, or estate, or property, which is the subject of the suit, as well as questions concerning the same to which the term may also be applied. The provisions of the codes, however, embrace legal actions; and in them it cannot generally be said that there is any fund, property, or estate, in relation to which the questions at issue have arisen, and which can be regarded as the "subject." In a very large proportion of legal actions, therefore, the term "subject of the action" can only be conceived of in the second sense which has been attributed to it, and denotes the totality of questions at issue between the parties, embracing, in short, both the primary rights and duties of the litigants, and the remedial rights and duties which have sprung from the injuries complained of. The term does not seem capable of any clear and complete analysis, and the result is that it may denote the "thing," if any, — land, chattel, person, fund, estate, and the like, — in respect of which rights are sought to be maintained and duties enforced, or it may denote the sum of the questions between the parties to be determined by the judgment of the court. The latter meaning is distinguishable and is to be distinguished from the "object of the action," which is always the relief to be obtained by the determination of the questions which constitute the "subject of the action."

VI. *Instances in which all the Causes of Action are against a single defendant, or against all the defendants alike.*

§ 491. In the cases included in this subdivision, no question can arise respecting the proper joinder of defendants. The only matter of inquiry is, whether all the causes of action fall within some one of the classes enumerated in the statute, so that they may be united in one judicial proceeding. As the first and most general of these classes has already been fully considered in another subdivision, it will not be again referred to. No general principle is involved which needs illustration and explanation; and I shall simply state, first, a number of cases as examples of a proper joinder, and, secondly, a number of instances in which the joinder has been held to be improper.

§ 492. All causes of action arising out of contract may be united, and this includes, of course, implied as well as express contracts. A complaint contained four causes of action. The first alleged that the father of the defendant, being indebted to the plaintiff, devised and bequeathed all of his property, real and personal, to the defendant, and in his will declared that "the said [defendant] is to pay all the debts that I may owe at my decease," "and also \$35 annually during her lifetime to" the plaintiff; that the defendant accepted such gifts and took possession of the property, and thus became liable to pay such debts and said annuity. The second count was for money had and received, the third on an express promise to pay money, and the fourth for rent due. Upon demurrer to this complaint, the defendant's liability in respect to the matters alleged in the first count was held to be, in contemplation of law, on an implied promise, and all the causes of action thus arising out of contract were properly united.¹

§ 493. In certain cases the plaintiff is allowed an election to treat the wrong done as a tort, or to waive the tort, and sue as upon an implied promise of the defendant. When this is permitted, a cause of action of such a nature in which the tort has been waived and the claim placed upon the footing of an implied promise may be joined with causes of action arising out of any other form of contract, express or implied; as, for example, where the first cause of action was for goods sold and delivered, and the

¹ Gridley v. Gridley, 24 N. Y. 180.

second averred that the defendant had wrongfully taken the goods of the plaintiff, had sold them and received their price, and demanded judgment for this sum so retained by him.¹ It has been recently held by the Supreme Court in New York, that where the plaintiff seeks to unite a cause of action merely upon contract with another cause of action originally for a tort, but in which the tort may be waived and the liability treated as springing from an implied promise, the pleading must show in some direct manner that the tort is waived, and that the claim is upon a promise; and to this end the plaintiff must not only allege the facts as they occurred, but must aver a promise to have been made by the defendant, in the same manner as an action of assumpsit was distinguished under the former system.² A complaint contained three counts. The first alleged a sale by the defendants of certain county warrants drawn in their favor as payees, and facts constituting an implied promise or guaranty that these instruments were legal and genuine, but that they were not genuine, and had been adjudged invalid as against the county in an action brought upon them; the second sought to charge the defendants as indorsers, treating the instruments as negotiable notes; the third was for money had and received. These causes of action were held to be properly united, since they all arose out of contract.³

§ 494. A claim to recover possession of land, a claim to recover damages for its detention or wrongful taking, and a claim for the rents and profits thereof during the defendant's occupancy, may all or any of them be united in one action:⁴ but the plaintiff is not compelled to do so; he may sue separately on each.⁵ An action to compel the specific performance of a contract to convey land,

¹ *Hawk v. Thorne*, 54 Barb. 164; *Leach v. Leach*, 2 N. Y. S. C. 657.

² *Booth v. Farmers' and Mech. Bank*, 1 N. Y. S. C. 46.

³ *Keller v. Hicks*, 22 Cal. 467.

⁴ *Vandevort v. Gould*, 38 N. Y. 639, 645; *Livingston v. Tanner*, 12 Barb. 481; *Holmes v. Davis*, 21 Barb. 265; 19 N. Y. 488; *Tompkins v. White*, 8 How. Pr. 520; *Armstrong v. Hinds*, 8 Minn. 254, 256; *Walker v. Mitchell*, 18 B. Mon. 541; *Burr v. Woodrow*, 1 Bush (Ky.), 602; *Sullivan v. Davis*, 4 Cal. 291. A claim to recover land, with damages for withholding the

same, and a claim of the rents and profits for its use, are distinct causes of action, and evidence to prove the latter is inadmissible under a complaint which does not contain such cause of action, but simply alleges the former. *Larned v. Hudson*, 57 N. Y. 151. It has been held that a claim to recover possession of one parcel of land cannot be joined with a similar claim in respect to another and distinct parcel. *Holmes v. Williams*, 16 Minn. 164, 169.

⁵ *Ibid.*

is, within the meaning of the statute, an action to recover possession of lands, and may be united with a cause of action for damages on account of defendant's delay in performing the contract.¹ In like manner, a claim to recover possession of chattels may be united with a claim for damages for their taking or detention.²

§ 495. Causes of action for injuries to property form a distinct class, and the generality of this language permits the union of claims arising from injuries of all kinds, whether with or without force, whether direct or consequential, and whether to real or to personal property. Singularly enough, injuries to the person are placed in the same group in most of the States, rather than in a class by themselves, or with injuries to character. The following are examples of causes of action arising from injuries to property which have been held properly united in a single suit: in an action against a railroad company (1) for damages resulting from the unlawful throwing down the fences on plaintiff's farm, whereby cattle entered and destroyed the growing crops; (2) for damages caused by water thrown on to the farm by means of an embankment; (3) for damages from earth piled upon the farm, obstructing the passage of teams and the free use of the land; (4) for damages occasioned by the killing of cattle by means of passing engines;³ an action by a mine-owner, alleging (1) injuries caused by the bursting of defendant's dam, negligently constructed, whereby gold-bearing earth was washed away, and (2) damages resulting from the delay and hinderance in working the mine;⁴ where the complaint contained two counts, the first being for trespasses done to the land prior to its conveyance to the plaintiff, the claim having been assigned to him, and the second alleged that the plaintiff was owner and in possession of the land, that the defendants were about to enter upon the same and quarry and carry away minerals therefrom, and prayed an injunction restraining the trespasses, the two causes of action were held to be properly joined, although one was legal and the other equitable.⁵ On the same principle, in a suit to recover possession of land, a separate cause

¹ *Worrall v. Munn*, 38 N. Y. 137. A demand for a specific performance against A. cannot be united with a demand to recover possession against B. *Fagan v. Barnes*, 14 Flor. 53, 56.

² *Pharis v. Carver*, 18 B. Mon. 236.

³ *Clark's Adm'r v. Han. & St. Jo. R. R.*, 86 Mo. 202; and see *Tendesen v. Marshall*, 8 Cal. 440.

⁴ *Fraser v. Sears Union Water Co.*, 12 Cal. 555.

⁵ *More v. Massini*, 32 Cal. 590, 595, per Shapter J. The opinion in this case is instructive.

of action may be added to restrain a threatened trespass and commission of waste.¹ A cause of action for deceit practised in the sale of chattels may be joined with one for the unlawful taking and conversion of other goods; the claim of damages for the fraud in such a case arises from an "injury to property" within the meaning of the codes.²

§ 496. Within the class of "injuries to character" fall not only actions for libel and for slander, but those for malicious prosecution; the gist of the latter, according to the old authorities, being the wrong done to the plaintiff's reputation. A cause of action for malicious prosecution may, therefore, be joined with one for libel or slander, or both.³

§ 497. The following are some special cases. In Wisconsin a complaint was sustained in an action by a creditor, one count of which set up a cause of action against a bank to recover certain property or its value, and another count alleged a cause of action against delinquent stockholders of the corporation.⁴ Where a complaint contained two causes of action, the first to enforce an implied trust alleged to have arisen in favor of the plaintiff on the conveyance of lands from himself to the defendant, and the second to enforce a vendor's lien on the same lands, they were held to be properly united, since both arose out of trusts, the one by virtue of a contract, and the other by operation of law.⁵ In another equitable suit the joinder of four causes of action was sustained, where the first was to reform a certain trust deed by inserting the name of a trustee, and to foreclose it when reformed, the second was to foreclose a mortgage upon the same land, while the third and fourth were to enforce certain charges which were liens on the land, and which the plaintiff had been compelled to pay in order to protect his security.⁶

§ 498. All of the foregoing cases were decided under State codes which contain substantially the same provisions and the same division into classes. In Indiana and Iowa, it will be remembered, the corresponding sections of the statute are peculiar, and

¹ *Natoma Water Co. v. Clarkin*, 14 Cal. 544.

² *Cleveland v. Barrows*, 59 Barb. 364, 374, 375, per T. A. Johnson J.

³ *Martin v. Mattison*, 8 Abb. Pr. 3; *Hull v. Vreeland*, 18 Abb. Pr. 182; *Watson v. Hazzard*, 3 Code Rep. 218; *Shore v. Smith*, 15 Ohio St. 178.

⁴ *Seaman v. Goodnow*, 20 Wisc. 27, *sed qu.*

⁵ *Burt v. Wilson*, 28 Cal. 682.

⁶ *Burnside v. Wayman*, 49 Mo. 856. The "trust deed" mentioned was, in fact, a form of security used in several of the States instead of a mortgage.

more latitude is permitted, especially in the latter State, in the joinder of unlike causes of action. As in Iowa, all legal or equitable causes of action may be united, a claim arising upon contract may be included in the same petition with one for damages resulting from any kind of tort.¹ And where twenty-two different parcels of land belonging to the same owners had been conveyed to the plaintiff by as many separate tax deeds, he was permitted to foreclose all these deeds, and thus cut off the owner's right of redemption in one action.² In construing the sections of the Iowa code which give the trial court a discretion in reference to the joinder of unlike causes of action, and which authorize it to compel an election, or to strike out on the defendant's motion, it is held that the provision for compelling the plaintiff to elect applies only to a case where the various causes of action set forth in the petition are merely different modes of stating one and the same demand, and the defendant must file an affidavit showing this fact as the basis of his motion; but the court may, on defendant's motion, strike out a cause of action which it deems impossible or inconvenient to try with the others, but in no case is a demurrer the proper remedy.³

§ 499. In Indiana, a cause of action by a wife for an absolute divorce was held properly joined with a cause of action to compel the specific performance of an agreement to convey certain lands to her made by the husband at the time of their separation.⁴ In California, by virtue of the provisions of a special statute, a cause of action against a sheriff to recover damages for his neglect to execute and return process may be joined with a claim to recover a statutory penalty for the failure in his official duty.⁵

§ 500. I shall conclude this section with a classified series of decisions which will illustrate the improper union of different causes of action. Except in Iowa, the rule is universal that a

¹ *Turner v. First National Bank*, 26 Iowa, 562.

² *Byington v. Woods*, 18 Iowa, 17, 19. See, *per contra*, *Turner v. Duchman*, 17 Wisc. 500.

³ *Reed v. Howe*, 28 Iowa, 250, 252; *Iowa, &c R. R. v. Perkins*, 28 Iowa, 281. In the following cases, the causes of action were held to have been improperly joined: an action by two plaintiffs for the destruction of chattels owned by them jointly, and also for an assault and battery

committed upon each; but, no motion having been made to strike out, the irregularity was thereby waived. *Grant v. McCarty*, 38 Iowa, 468: an action by two persons not partners for a slander of each, but on the trial the case was severed, and the trial proceeded on behalf of one alone, and this was held proper. *Hinkle v. Davenport*, 38 Iowa, 355.

⁴ *Fritz v. Fritz*, 23 Ind. 388.

⁵ *Pearkes v. Freer*, 9 Cal. 642.

cause of action upon contract cannot be joined with one to recover damages for a tort, unless both should arise out of the same transaction, and thus fall within the inclusive terms of the first class. The following are examples merely of this elementary rule: A count against the defendant for his wrongful acts as president of a bank, and one against him as a stockholder in such bank to recover on its notes, were improperly embraced in the same complaint;¹ also a claim against certain part owners of a vessel to recover her hire, which they had received, and one to restrain them from a threatened wrongful sale of the ship.² It has been held that a demand arising from the breach of a warranty given upon the sale of chattels cannot be joined with one based upon the vendor's deceit practised in the same sale.³ Notwithstanding these decisions, it is impossible to conceive of two legal causes of action which more completely and accurately correspond to the language of the codes, as "arising out of the same transaction." The bargain between the parties is certainly a transaction; certain language used by the seller may amount to a contract of warranty; certain other language may be the false representations; indeed, it is possible, and not at all unlikely, that the selfsame words spoken by the vendor might be at once the fraudulent representations and the promise, for language otherwise sufficient is none the less a promise because the person using it knowingly lied when he uttered it. To say that these two demands do not arise out of the same transaction, is virtually to say that no two different *legal* claims ever can so arise. I cannot regard these decisions, therefore, otherwise than mistaken.

§ 501. In an action against a railroad company, the complaint contained three counts; the first for wrongfully carrying away and converting cattle; the second for the same injury done to hogs; and the third set up an agreement to transport cattle from a specified place to another, and averred a breach thereof by means of a negligent omission whereby the plaintiff lost his cattle. On demurrer, it was said that the first two causes of action, being for torts, could be joined; but the third was upon contract, and its union with the others was error.⁴ The joinder of a count for

¹ *Butt v. Cameron*, 58 Barb. 642; but see *Wiles v. Suydam*, 6 N. Y. S. C. 292.

² *Coster v. N. Y. & E. R. R.*, 3 Abb. Pr. 382.

³ *Springsteen v. Lawson*, 14 Abb. Pr. 328; *Sweet v. Ingerson*, 12 How. Pr. 381.

⁴ *Colwell v. N. Y. & E. R. R.* 9 How. Pr. 311; *Hoagland v. Han. & St. Jo. R. R.*, 39 Mo. 451.

the conversion of chattels with one for money had and received would be clearly wrong;¹ and the same is true of any tort and implied contract.² It is doubtful whether a cause of action on contract and one for a tort to the person can be conceived of as arising out of the same transaction, so that they may be embraced in the same pleading. The attempt, however, has been made to unite a claim for the breach of a written contract to convey land with a cause of action for assault and battery committed by the defendant in forcibly taking the instrument from the plaintiff's possession, but it was unsuccessful.³ In like manner a cause of action against a lessee arising upon the lease cannot be joined with a claim for damages on account of injuries done to the property, unless, of course, the latter is embraced within some stipulation or covenant of the lease, so that it would in fact be a demand on the contract.⁴ It can make no difference with the rule that the tort is a fraud consisting in false statements or concealments. Thus, a complaint by an indorsee against his immediate indorser was held bad on demurrer, one count of which alleged the ordinary liability of defendant as indorser, and the other set up certain false representations as to the solvency of the maker, by which the plaintiff was induced to purchase the paper.⁵ The rule, in short, applies to all cases of demands based upon a promise, express or implied, and claims based upon fraud, unless the tort may be waived, and the complaint be framed so as to present both causes of action as arising from contract.⁶

§ 502. Another particular rule, which is but an application of the same doctrine, requires that the several causes of action against or for a given person should all affect him in the same capacity. In other words a demand for or against a party in his personal character cannot be united with another demand for or against him in a representative character as trustee, executor, administrator, receiver, and the like. The reason usually given for this rule when applied to defendants is, that the judgment

¹ *Cobb v. Dows*, 9 Barb. 230, and cases in last note.

² *Hunter v. Powell*, 15 How. Pr. 221.

³ *Ehle v. Haller*, 6 Bosw. 661.

⁴ *Ederlin v. Judge*, 36 Mo. 350. Conversely, a claim of damages for the breach of the lessor's covenant of quiet enjoyment, and a claim of damages for a trespass in his wrongful entering upon the

demised premises and injuring the lessee's property thereon, cannot be joined. *Keep v. Kauffman*, 66 N. Y. 332.

⁵ *Jamison v. Copher*, 35 Mo. 483.

⁶ *Forkner v. Hart*, *Stanton's Code* (Ky.) 60; *Wilson v. Thompson*, *Ibid.* 60; *Hubbell v. Meigs*, 50 N. Y. 430, 437; *Booth v. Farmers' and Mechanics' Bank*, 1 N. Y. S. C. 45.

upon one cause of action would be against the defendant personally, to be made *de bonis propriis*, while the judgment upon the other cause of action would be against him in his representative or official capacity, and not perhaps to be made out of his own property; as, for example, it might be made *de bonis testatoris*. This reasoning, borrowed from the old law, is a mere formula of words, for there is nothing in the nature of things which prevents such a double judgment. It is just as easy for such a judgment to be rendered in one action as it is for two distinct judgments to be granted in separate suits. The argument, however, like so much of so-called legal reasoning, still has convincing force with most of the courts, even while administering the reformed system. The following cases are given as illustrations of this doctrine, and in all of them the joinder was pronounced improper: A complaint on a partnership debt against the defendant as surviving partner, and against him in a separate count as executor of his deceased partner;¹ against the defendant personally, and also as an executor or administrator;² in a suit against an executor or administrator, a demand which existed against the deceased in his lifetime, and a different demand which arose from a promise made by the executor or administrator after the death, for as to the latter claim the defendant is personally liable.³ On the same principle a demand upon a contract between the plaintiff and the defendant, and a claim by the plaintiff as a shareholder in an unincorporated company against the defendant as president thereof, in respect of matters connected with the management of its affairs, were held to be improperly joined, since the defendant's liability if any in the latter cause of action existed against him as a trustee.⁴ The plaintiff must also sue in the same capacity in respect of all the causes of action. He cannot in one count sue as an executor or administrator, and in another sue in his personal character.⁵ In an action for malicious prosecution the complaint contained three counts: the first for the malicious prosecution of the plaintiff himself; the

¹ Landau v. Levy, 1 Abb. Pr. 376.

² McMahon v. Allen, 3 Abb. Pr. 89.

³ Ferrin v. Myrick, 41 N. Y. 315, 322; Austin v. Munro, 47 N. Y. 360, 364; s. o.

⁴ Lans, 67. See, however, Tradesman's Bank v. McFeely, 61 Barb. 522, which cannot be regarded as correct in the light of these other decisions.

⁴ Warth v. Radde, 18 Abb. Pr. 396.

⁵ Lucas v. N. Y. Cent. R. R., 21 Barb. 245. But see Armstrong v. Hall, 17 How. Pr. 76, per C. L. Allen J., at Special Term, — a decision in direct opposition to the rule stated in the text.

second for the same wrong done to his wife, she having been imprisoned; and the third for a like tort to his minor children. The only legal ground for recovery on the second and third of these counts was declared to be the loss of the wife's society in the one case, and of the children's services in the other; as these injuries were personal to the plaintiff, they could be joined with the cause of action alleged in the first count for the tort directly to himself.¹

§ 503. The cases which follow do not admit of any classification, and several of them are of doubtful authority, even if not palpably erroneous. A cause of action for a limited divorce on the ground of cruelty, desertion, and the like, cannot be united with one for an absolute divorce on account of adultery, or of any other matter prescribed by statute. The two demands are simply incompatible.² It was decided by one judge in New York that a demand to recover possession of a chattel cannot be united with a claim of damages for the taking, detaining, and converting the same. But as the codes expressly authorize the joinder of claims for the possession of chattels, and of damages for the withholding the same, this decision can hardly be sustained. "Withholding" clearly includes "detaining," and as it is not a technical term, it was doubtless intended to embrace "taking" and "conversion" as well.³ A cause of action to recover the possession of a certain parcel of land, cannot, it has been said, be united with a demand of damages caused by the defendant's trespasses upon other lands of the plaintiff.⁴ It has also been held that a claim to recover possession of land, and a demand of damages for the defendant's tortious entry upon the same land, cannot be joined, *because they are entirely inconsistent*.⁵

§ 504. In one or two of the States, actions for injuries to the

¹ Rogers v. Smith, 17 Ind. 828.

² Henry v. Henry, 17 Abb. Pr. 411; McIntosh v. McIntosh, 12 How. Pr. 289. It would be difficult to determine in what class the action for either kind of divorce falls. One judge in the last case suggested that limited divorce was a claim for injury to the person. It seems to be *casus omissus*.

³ Maxwell v. Farnam, 7 How. Pr. 286, per Harris J., at Special Term.

⁴ Hulce v. Thompson, 9 How. Pr. 118. But cannot both causes of action be re-

ferred to the single class of "injuries to property"? The recovery of possession is merely the relief, and not the cause of action.

⁵ Budd v. Bingham, 18 Barb. 494, per Brown J. It is difficult to perceive this inconsistency. This and some similar decisions are cited, not because they have any authority or any value, but to complete the statement of the judicial interpretation put upon this provision of the statute.

person constitute a separate class, and are not grouped together with those for injuries to property. Thus in California, an "action to recover damages for alleged injuries to the person and property of the plaintiff, and for his false imprisonment, and for forcibly ejecting him from a house and lot in his possession, and detaining the possession thereof from him," was held to be an improper union, as it embraced causes belonging to two if not three of the classes specified in the code;¹ and in another case, the joining of a claim to recover possession of land, damages for its detention, damages for the forcible expulsion of the plaintiff from the premises, and the value of the improvements made by him, was pronounced equally an error for the same reason.²

§ 505. An action to quiet the title to three different tracts of land which had belonged originally to different owners, and which the plaintiff held under three distinct tax deeds executed at separate times, was held in Wisconsin to violate the requirements of the code. The proceeding was likened by the court to the foreclosure in one action of three different mortgages given by three different owners upon three separate parcels of land.³

SECTION THIRD./

THE GENERAL PRINCIPLES OF PLEADING.

§ 506. In order that the system of pleading introduced by the reformed procedure may be accurately understood, I shall briefly describe the essential principles and doctrines of those which prevailed in different courts at the time of its adoption, and the comparison which can thus be made will be of great assistance in arriving at correct results. The three types of pleading then known either in England or in this country were the common law, the equity, and that which in the absence of a distinctive name I shall call "pleading by allegation." The last-mentioned method was used in the courts of admiralty, of probate and divorce, the ecclesiastical courts, and wherever the law as administered was based directly upon the doctrines and modes of

¹ *McCarty v. Fremont*, 23 Cal. 196, see *Bowles v. Sacramento Turnp. Co.*, 5 Cal. 224; *Bigelow v. Gove*, 7 Cal. 133.

² *Mayo v. Madden*, 4 Cal. 27. And ³ *Turner v. Duchman*, 28 Wisc. 500.

the Roman Civil Law. Its peculiar features consisted (1) in breaking up an entire pleading into a number of separate paragraphs, — technically “allegations,” — each of which should properly contain a single important circumstance or principal fact going to make out the cause of action; and (2) the statement in each allegation of all the minute and subordinate facts which taken together compose, and are evidence of, the main circumstance or fact relied upon by the litigant party to sustain his contention. The pleading as a whole, therefore, comprised not only averments of the substantial facts, the important conclusions of fact which must be established by the proofs, — those facts which in the common-law system are called “issuable” or “material,” — but also a narrative of all the probative facts, of all the evidence from which the existence of the “issuable” facts must be inferred. A libel constructed upon this theory disclosed the whole case of the complaining party; if properly framed, it set forth in a continuous and narrative form a complete account of the transaction, describing the situation of the parties at its commencement, all the various incidents which happened in its progress, its final conclusion, and the results produced upon each, and prayed for such relief as the law affords in the given case. The codes of several States have plainly intended to borrow one feature of this system; that is, the separation of the pleading into a number of distinct paragraphs continuously numbered, and each comprising the statement of a single material or issuable fact. The second feature, namely, the narrative of probative facts and circumstances in the manner above described, violates the fundamental and essential principle of the reformed procedure.

§ 507. The equity method of pleading, when freed from all the superfluous additions which had become incorporated with it in practice, and when thus reduced to its mere essential elements, consisted in a statement of all the facts indicating the relief to which the complainant is entitled, and in this original aspect it did not differ in principle from that prescribed by the codes. I purposely make use of the expression “facts indicating the relief to which the complainant is entitled,” rather than the ordinary phrase “facts constituting the complainant’s cause of action,” for a reason which will be fully explained in the sequel. I now call attention to the form of expression, for it is important, and will assist in removing certain difficulties which have been sug-

gested by some of the judges in their exposition of the codes. Practically, a bill in equity, prior to any modern reforms, had been changed from the original simplicity as above described, and had come to consist of three distinct parts or divisions, the narrative, the charging, and the interrogative. The first of these contained a statement of the complainant's case for relief; the second anticipated and rebutted the defendant's supposed positions; while the last was used to probe the defendant's conscience, and to extract from him admissions under oath in his answer concerning matters within his own knowledge which the existing rules of evidence did not permit to be proved by the parties themselves as ordinary witnesses. The result of these modifications was an almost entire departure from the simple conception of equity pleading. The bill and answer were generally made to include the evidence by which either party maintained his own contention, or defeated that of his adversary, and also legal conclusions and arguments which more appropriately belonged to the briefs of counsel and the discussions at the hearing. All this, I say, although very common and perhaps universal in the actual practice before any reforms through legislation or rules of court, was really unnecessary, and formed no essential part of the theory of equity pleading. The only indispensable portion of a bill was the narrative. Except for the purpose of eliciting evidence from the defendant, there was no more reason why this should contain mere *evidence* of the facts that were the foundation of the complainant's demand for relief, as contradistinguished from those facts themselves, than there was for the same kind of probative matter to be inserted in a declaration at law. The bill in equity, as has been already said, should comprise a statement of all the facts which show the relief to which the complainant is entitled, which indicate the nature and extent of that relief whether total or partial, and the modifications or exceptions to be made in it; while the answer should perform the same office for the defendant. By the application of this doctrine, a bill in equity was generally quite different in its contents from a declaration at law; it was ordinarily more minute in its averments, and contained statements of matter which in a legal action would more naturally and properly belong to the evidence rather than to the allegations of issuable facts. The reason for this distinction lay entirely in the difference between

equitable and legal primary rights and between equitable and legal remedies, especially in the latter. A judgment at law was always a single award of relief; the recovery either of a specific tract of land, or of a specific chattel, or of a definite sum of money, and such judgment, whatever might be its amount, was either wholly rendered for the plaintiff, or wholly denied. Furthermore, the right to recover a legal judgment always depended upon the existence of a comparatively few important facts, — “issuable” or “material” facts, — and the very definition of an issuable fact is, one which, if denied and not proved, would prevent the plaintiff from recovering. In equity, the primary rights and remedies of the complainant were often very different from those which existed at law. His remedy was not necessarily a single recovery of some specific form of relief; it might vary in its nature and extent through a wide range; it might be total or partial, it might be absolute or conditional. The defence, on the other hand, might be total or partial; and it might even consist of modifications made in the form of relief demanded by the complainant, or in supplemental provisions added thereto in order to meet some future contingency. In short, it was impossible to say that the complainant's right to recover always depended upon the existence of certain “issuable” facts, the failure to establish either one or even all of which would necessarily defeat his contention. It is true that in some cases the equitable remedy sought by the complainant might be of such a nature that it would follow from the proof of such issuable facts as completely and directly as the plaintiff's right to a common-law judgment does in a legal action. While this was possible in some instances, in the great majority of equitable actions the relief was more complicated; the primary rights were more comprehensive; and the decree as a whole was shaped, modified, and adapted to various circumstances and minor facts upon which individually the cause of action or the defence did not entirely rest, but all of which in combination entered into the resulting remedial right belonging to the litigant parties. Now, on the theory of equity pleading, all these facts should be averred by the complainant or the defendant as the case might be; and while it can be properly said that they all indicate and affect the relief to be awarded by the court, they cannot all be said “to constitute the cause of action” or the

defence in the same sense in which the "issuable" or "material" facts constitute the cause of action or the defence in a suit at law. I repeat the statement already made, for it is an important one, that this description does not necessarily apply to every case of equitable relief. Under certain circumstances, and in some particular instances, the remedy and the right to its recovery are single and depend upon the existence of a few well-defined and controlling facts; such facts are then "material" or "issuable" in the strictest sense of those terms, and they are all that it is requisite to allege in the pleading. In most instances, however, an equity pleading necessarily contained allegations of facts which were not "issuable" in the technical meaning of that word, but which were nevertheless the basis of the relief demanded and obtained. I have dwelt thus carefully upon the foregoing analysis, because it is the element which enters into and decides a most important question to be considered in the sequel; namely, whether the proper modes of pleading in legal and in equitable actions under the reformed procedure can be referred to and derived from the single fundamental principle announced by all the codes. Another essential feature belonged to the equity method of pleading, and distinguished it from that which prevailed in courts of law. The facts upon which the contentions of the litigant parties wholly or partially depended were averred as they actually happened or existed, and not the legal effect, or aspect of those facts. This distinction was a vital one, as will be fully pointed out in the succeeding paragraphs, and its relations with the reformed theory of pleading are direct and intimate.

§ 508. I come finally to the common-law system of pleading. It has frequently been said, even by able judges, that under this method the material, issuable *facts* constituting the cause of action, and they alone, were to be alleged; and that, as exactly the same principle lies at the basis of the new system, the latter has made no substantial change, but has only removed the unnecessary and troublesome incidents which had been gathered around the original simple common-law conception. In support of this view, the general language of Chitty and other text-writers is quoted as conclusive. There is just enough truth in this description of the common-law pleading to make it plausible; but enough of error to render it, when adopted as a means of interpreting the codes, extremely misleading. In fact, it is impos-

sible to describe the common-law pleading as a unit: it was governed by no universal principles; the modes which prevailed in certain actions were radically unlike those that were employed in others. I shall attempt, in a very brief manner, to point out all its essential features, and to explain its general character.

§ 509. In the first place, certain elements were firmly incorporated into the system which were not really fundamental and essential, although often regarded and spoken of as its peculiarly characteristic requisites. I refer to the extreme nicety, precision, and accuracy which were demanded by the courts in the framing of allegations, in averring either the facts from which the primary rights of the parties arose, or those which constituted the breach of such rights, in the use of technical phrases and formulas, in the certainty of statement produced by negating almost all possible conclusions different from that affirmed by the pleader, in the numerous repetitions of the same averment, and finally in the invention and employment of a language and mode of expression utterly unlike the ordinary spoken or written English, and meaningless to any person but a trained expert. This requirement of accuracy and precision was in former times pushed to an absurd and most unjust extreme; as for example, the use of the past tense "had," instead of the present "have," in a material allegation, would be fatal to the plaintiff's recovery. If it be said that these extreme niceties and absurd technicalities were things of the past, abandoned by the law courts in modern times, a perusal of some standard reports — for instance, those of Meeson and Welsby — will show on what grounds of the merest form the rights of litigant parties have been determined, even within the present generation. Still, I do not regard this precision, accuracy, and general technicality, which actually distinguished the common-law system of pleading, as something essential to its existence, as its absolutely necessary elements. It might have retained all its fundamental principles in respect to the nature of the allegations used and the kinds of facts averred, and at the same time have employed the familiar language of common narrative in making all these averments. The essential elements of the system would then be presented in their naked simplicity. The actual technicalities which have been thus mentioned, and which were the boast of the skilful special pleader, were only a disgrace to the administration of justice. However pleas-

ant they might have been as exercises in logic, they were productive of untold injustice to suitors. It is simply amazing that they could have been retained so long and adhered to so tenaciously, and even lauded with extravagant eulogium, among peoples like the English and the American. That they were entirely abrogated by all the codes of procedure is plain; and after a series of improvements, commencing in 1834, when the celebrated "Rules of Hilary Term" were adopted, the British Parliament has swept them out of the English law, and has introduced the substance of the American system.

§ 510. Passing from these technical incidents, I proceed to inquire what were the real and essential principles and elements of the common-law pleading. How far was it true that the material facts constituting the cause of action, and these alone, were to be alleged? This statement was partly correct, — that is, correct under most important limitations and reservations, in certain of the forms of action; while in the other of these forms of action it was not true in the slightest extent; in fact, it was diametrically opposed to the truth. I will recapitulate the important actions, and refer them to their proper classes. In ejectment there can be no pretence that any attempt was made to allege the actual facts constituting the cause of action; the declaration and accompanying proceedings were a mass of fictions which had become ridiculous, whatever may have been their original usefulness, and the answer was the general issue; the record thus threw no light upon the real issues to be tried by the jury. In trover, the averments of the declaration were that the plaintiff was possessed, as his own property, of certain specified chattels; that he lost them; and that the defendant found them, and converted them to his own use. Throwing out of view the absurd fictions of a loss and a finding, there was here the statement of two facts, namely, the description of the chattels so as to identify them, and the plaintiff's property in them; but the most important allegation of all, the one upon which in the vast majority of cases the whole controversy would turn, was a pure conclusion of law. The statement that defendant had converted the same to his own use did not indicate any fact to be considered and decided by the jury in reaching their verdict. In the action of debt, also, the important allegation was a mere conclusion of law, namely, that the defendant was indebted to the plaintiff in a certain sum whereupon

an action had accrued ; and although the declaration contained a further statement of the consideration or cause of the indebtedness, yet as a whole it did not pretend to set forth the material facts constituting the cause of action. In assumpsit, the pleadings were of two very different species. In all cases of implied promises, and especially when the common counts were resorted to, the averments were purely fictitious, as much so as in ejectment ; there was not the slightest approach towards a statement of the facts constituting the cause of action as they actually existed. When the suit was brought upon an express contract, and the declaration was in the form of a special assumpsit, there was a greater *appearance* of alleging facts ; but even here the facts were stated in their supposed *legal* aspect and effect, as legal conclusions, and not simply as they occurred. There are left to be considered the actions of covenant, detinue, trespass, and case. In each one of these, according to the nature of the action, the facts constituting the grounds for a recovery were more nearly stated, although in some of them the averments were required to be made in an exceedingly precise and technical manner. The declaration in a special action on the case necessarily comprised a narrative of the actual facts constituting the cause of action ; but as has been said, this narrative was thrown into a very arbitrary, technical, and unnatural shape. It therefore bore some resemblance in substance to a complaint or a petition, when properly framed according to the reformed theory ; and some judges have even said that every such complaint or petition is a declaration in a special action on the case. The assertion so often made by the older text-writers, and repeated by modern judges, that the common-law system of pleading demanded allegations of the *facts* constituting the cause of action or the defence, is thus, as a general proposition, manifestly incorrect, for in many forms of action there was no pretence of any such averments.

§ 511. But we must go a step farther in order to obtain an accurate notion of the common-law theory. In all the instances where fictions were discarded, and where the important allegations were not mere naked conclusions of law, but where, on the contrary, the plaintiff assumed to state the “issuable” facts constituting his cause of action, he did not narrate the exact transaction between himself and the defendant from which the rights and duties of the respective parties arose ; *he stated only what he con-*

ceived to be the legal effect of these facts. The "issuable" facts, in the contemplation of the common-law system, were not the actual controlling facts as they really occurred, and as they would be proved by the evidence, from which the law derived the right of recovery: they were the *legal aspect of those facts*,—not strictly the bare conclusions of law themselves derived from the circumstances of the case, but rather combinations of fact and law, or the facts with a legal coloring, and clothed with a legal character. The result was, that the "issuable" facts as averred in the pleading were often purely fictitious; that is, no such events or occurrences as alleged ever took place, but they were represented as having taken place in the manner conceived of by the law. The pleader of course set forth his own view of this legal effect under the peril of a possible error in his application of the law to his case; if a mistake was made in properly conceiving of this legal effect,—or, in other words, if the facts established by the evidence did not correspond with his opinion as to their legal aspect stated in the declaration,—the plaintiff's suit would entirely fail.¹

¹ In corroboration of these conclusions, I quote a paragraph from a series of exceedingly able articles upon the English Judicature Bill, which appeared in the "Saturday Review" during the year 1873, and were correctly attributed to one of the foremost English barristers as their author. While discussing the pleading which ought to be introduced, he describes the common-law methods by way of contrast, and, among others, the following as one of its features: "The first striking difference is this, that, on the common-law plan, a plaintiff is required to state, not the facts, but what he considers to be the legal effect of the facts. If his advisers take a wrong view of a doubtful point, and make him declare, say, for goods sold and delivered when the real facts, as proved, only make a case of goods bargained and sold, the unlucky plaintiff is cast, not because he is not entitled to recover, but because he has not put his case as wisely as he might have done. In practice, dangers of this kind are mitigated, though by no means invariably escaped, by inserting a multitude of counts, all giving slightly different ver-

sions of the same transaction, in order that on one or other of them the plaintiff may be found to have stated correctly the legal effect of the facts. The permission to do this was in fact a recognition of the plaintiff's inherent right to ask alternative relief; but it was clogged by the absurd condition that he could only do so by resorting to the clumsy fiction of pretending to have a number of independent grounds of action, when he knew that he had only one, but did not know exactly what the court might consider the legal effect of his facts to be. This was not only unscientific and irrational, but, in some cases, it has led to enormous expense by compelling a plaintiff to declare on, and a defendant to plead to, scores of fictitiously differing counts, when there was only one matter in dispute between them. We do not suppose that the greatest zealot among special pleaders would say that such a queer scheme as this is preferable to one under which the plaintiff states the facts on which he founds his claim, and asks for such relief as their legal effect may entitle him to." "Saturday Review," April 12,

§ 512. The extent of these fictitious allegations in pleading, and their influence upon the form and growth of legal doctrines at large, are exhibited in a remarkable manner by the history of the action of assumpsit, and its effect in originating and developing the doctrine of implied promises and contracts. At an early day, the action of debt was the only one by which to recover for the breach of an unsealed contract; but the defendant was permitted to "wage his law," and by that means to greatly embarrass, if not to defeat, the plaintiff's recovery. To obviate this difficulty, the action of assumpsit was at length invented. The gist of this action was the defendant's promise; the distinctive averment of the declaration was the promise, of course express in form, and so indispensable was it, that, if the allegation was omitted, judgment would be arrested, or reversed on error, even after verdict in the plaintiff's favor. The promise was stated to have been express, and in fact no form of common-law action provided for a recovery upon an implied promise; in every case of assumpsit, either general or special, on the common counts or otherwise, the defendant was represented as having expressly promised. For a considerable period of time after the invention of assumpsit, undoubtedly the contracts enforced by its means were all express, so that the averment of the declaration accorded with the actual transaction between the parties, as shown by the evidence. In the course of time, however, cases were brought before the courts, in which the right of action on the one hand, and the liability to pay on the other, depended upon a moral and equitable duty of the defendant, arising, not from any promise made by him, but from the acts, circumstances, and relations existing between him and the plaintiff. The courts were thus placed in a dilemma. The obligation of the defendant and the right of the plaintiff were founded upon the plainest principles of equity and justice, and to deny their existence was impossible. Still, there was no action directly appropriate for their enforcement. None of the actions *ex delicto* could be used, since there was no tort; debt was also out of the question, because the amount claimed was unliquidated damages; even assumpsit was not applicable, for there

1878, vol. 35, p. 472. In the face of this most accurate description of common-law pleading in its essence, the assertion that it requires a statement of the actual facts constituting the cause of action is seen to

be as fictitious as many of its ordinary allegations, — one of the fictions which make up so large a part of the system itself.

was no promise. In this emergency the English judges were true to their traditions, and to all their modes of thought. Instead of inventing a new action, and applying it to the new class of facts and circumstances, they reversed the order, and applied the facts and circumstances to the already existing actions. They fell back upon their invariable resource, the use of fictions; but went farther than ever before or since; and, instead of inventing a fictitious element in the action, they actually added a fictitious feature to the facts and circumstances from which the legal right and duty arose. They selected the existing action of *assumpsit* as the one to be employed in such classes of cases; and since that action is based upon a promise, and since the declaration must invariably allege a promise to have been made, the early judges, instead of relaxing this requirement of pleading, actually added the fictitious feature of a promise which had never been made to the facts which constituted the defendant's liability. In other words, the courts invented the notion of an implied promise, in order that the cases of liability and duty resulting from certain acts, omissions, or relations where there had been no promise, might be brought within the action of *assumpsit*, and be tried and determined by its means. There is no more singular and instructive incident than this in the whole history of the English law, and it has a most direct and important connection with the practical rules of pleading under the reformed procedure of the codes. We see that the notion of an implied promise as the ground of recovery in these cases of moral and equitable duty did not exist prior to and independent of the action which was selected as the proper instrument for its enforcement; on the contrary, the action already existed the distinguishing feature of which was the allegation of a promise made by the defendant, and a fictitious or "implied" promise was invented and superadded to the actual facts constituting the defendant's liability, for the simple purpose of bringing his case within the operation of that action and its formal averment.¹

¹ It would be both interesting and instructive to trace this doctrine of implied promises through the whole series of cases, from its first suggestion as a fiction of pleading until it became firmly incorporated into the general theory of contracts; but my limits will not permit such an

excursion. I quote, however, the conclusions reached by Judge Metcalf in his exceedingly able work upon *Contracts*, as an authority for the position taken in the text. After an analysis of numerous early cases, he says: "As there will be no occasion to advert hereafter to the fictions

§ 513. Having thus described the three types of pleading in existence when the reformed procedure was inaugurated, I now proceed to examine the system introduced by that procedure itself. In pursuing this investigation, I shall endeavor, *first*, to ascertain the essential and general principles upon which it is founded; *secondly*, to determine the manner in which the plaintiff should set forth the affirmative subject-matter of the action in his complaint or petition; and *thirdly*, to apply the results thus reached to the most important and common instances of action and remedy. Although I shall aim at a close conformity with the true spirit and intent of the statutory legislation, yet this intent will be sought for in the decided cases which have given a judicial interpretation to the codes. It must be conceded at the outset that there is an irreconcilable conflict between two classes of decisions, not only in mere matters of detail, but in

adopted in setting forth the plaintiff's claim in declarations in the action of assumpsit, it may not be amiss to present a succinct view of those fictions, and of the reasons on which they are founded. The usual action on a simple contract in old times was debt. The declaration in that action averred in substance that the defendant owed the plaintiff, and thereupon an action had accrued, &c. No promise was alleged, for no promise was necessary. But the defendant was allowed to wage his law. To avoid this wager of law, a new form of action was devised, to wit, the action of assumpsit, in which a promise of the defendant was alleged, and was indispensable. A declaration which did not aver such promise was insufficient even after verdict; and the law is the same at this day. The promise declared on is always taken to be express. In pleading, there is no such thing as an implied promise. But as no new rule of evidence was required in order to support the new action of assumpsit, it being necessary only to prove a debt, as was necessary when the action was debt, the fictitious doctrine of an implied promise was introduced; and for the sake of legal conformity, it was held, when the defendant's legal liability was proved, that the law presumed that he had promised to do what the law made him liable to do. . . . A single example will illustrate these two

fictions [the author had described the kindred fiction of an (implied) request alleged to have been made]. A husband is bound by law to support his wife; and if he wrongfully discard her, any person may furnish support to her, and recover pay therefor of the husband. In the action of debt, there would be no necessity to allege a promise in such a case. But the husband might wage his law, and defraud the plaintiff. In the action of assumpsit, the furnishing of the supplies must be alleged to have been by the plaintiff at the husband's request, and a promise of the husband to pay must also be alleged. But proof of the actual facts supports both these allegations. The husband being in law liable to pay is held to have (impliedly) made both the request and the promise." *Metcalf on Contracts*, pp. 203, 204. This origin of the implied promise, of its invention as a fiction in order to bring the case within the operation of "assumpsit," throws a strong light upon the question, whether, in an action to enforce such a liability under the codes, the plaintiff should, in addition to the actual facts from which the defendant's liability arises, also allege a promise to have been made by him. The promise was simply a formal incident of the particular action in the old system, and is certainly no more than such an incident in the new.

their whole course of reasoning, in the premises which they assume, and in the conclusions which they draw therefrom. But this conflict was, in by far the greater part of the States, confined to the earlier periods of the reform, and has virtually disappeared. There is a substantial agreement among the courts in respect to the general principles which they have finally adopted: whatever differences now exist arise in the process of applying these fundamental doctrines to particular cases. The confusion which actually prevails to a very great extent in several of the States results not from any uncertainty either in the general principles or in the more subordinate rules, but from an entire ignorance or disregard of them by pleaders, and from a neglect to enforce them by the judges.

§ 514. Before entering upon the matter thus outlined a preliminary question suggests itself, upon the answer to which much of the succeeding discussion must turn. This question involves the true relations between the doctrines and rules of pleading enacted by the codes and those which existed previously as parts of the common law and the equity jurisprudence, and may be stated as follows: Are the doctrines and rules contained in the statute to be regarded as the sole guides in pleading under the reformed procedure? or are the ancient methods still controlling, except when inconsistent with some express provisions of the later legislation? In answering this inquiry, the two schools of interpretation so often mentioned again appear, and the difference between them is the same as that already described under a somewhat altered shape. It is plain that the position taken by the courts, in answering the question here suggested, must to a very great extent influence the whole body of practical rules which they adopt in reference to pleading as well as to all the other features of the civil action. According to one theory, these doctrines and rules of the common law and of equity still remain, although changed in many particulars by the reform legislation: the pleader must first recur to them, and must then examine how far their requirements have been abrogated or altered by the statute; in a word, the legislation is purely amendatory, and is not reconstructive. According to the other theory, these doctrines and rules of the common law and of equity do not exist at all as authoritative and controlling,—that is, as controlling *because* rules of the common law or of equity. The general principles

and fundamental requirements of the codes have been substituted in their place, completely abrogating them, and constituted by the legislature as the only sources of authority to the bench and the bar in shaping the details of the reformed procedure. If any particular doctrine or rule which formerly prevailed is also found existing to-day, it so exists not because it is a part of the common law or of the equity system, but because it is either expressly or impliedly contained in and enacted by the reformatory statute. When, therefore, in discussing and interpreting such a doctrine, a resort is had to the former methods for aid, the reference is, not to obtain authority, but to find an analogy or explanation. In other words, the system introduced by the codes is regarded as complete in itself, entirely displacing the ancient modes. In several particulars, however, its doctrines and rules are either identical with or closely resemble those which existed before; and, in their judicial construction, recourse must be had by way of explanation and analogy merely to these original forms, but no such recourse is to be had for the purpose of obtaining the authority for any proposed measure or practical regulation connected with the pleading under the new procedure.

§ 515. During the earlier periods of the present system, there was an evident disposition on the part of some judges and courts to adopt the former of these two views, and to hold that the old methods, rules, and requisites of the common law and of equity, are still applicable in substance when not inconsistent with the provisions of the statute; or, in other words, that they had been supplanted only so far as such inconsistency extends.¹ The second theory has, however, been generally if not universally adopted as the true interpretation to be put upon the language of the codes, and as the starting-point in the work of constructing a system of practical rules for pleading. The proposition, as stated in the foregoing paragraph, has been expressly announced in well-considered judgments; in the vast majority of instances, however, it has rather been assumed and impliedly contained in the decision of the court, yet none the less passed upon and affirmed. It may now, I think, be regarded as the established

¹ See *Howard v. Tiffany*, 3 Sandf. 695; *Davis*, 6 How. Pr. 401; *Houghton v. Fry v. Bennett*, 5 Sandf. 54; *McMaster Townsend*, 8 How. Pr. 447; *Boyce v. Booth*, 4 How. Pr. 427; *Rochester City v. Brown*, 7 Barb. 80; *Knowles v. Gee*, 8 Barb. 300; *Bank of Genesee v. Patchin v. Waffle*, 6 How. Pr. 145; *Buddington v. Bank*, 18 N. Y. 309, 313.

doctrine, that the code in each of the States is the only source of authority from which rules of pleading may be drawn, that its methods have completely supplanted those which preceded it, so that the latter can no longer be appealed to as possessing of themselves any force and authority.¹

§ 516. *The general and essential principles of pleading.* I shall now proceed to gather from the text of the codes, as interpreted by the most authoritative decisions, and to state in order, the comparatively few general and essential principles of pleading introduced by the reformed procedure, which constitute the foundation of its simple, natural, and scientific as well as practical system. These essential principles apply to certain classes of answers in addition to all complaints or petitions, although from the nature of the two pleadings they find their fullest and highest expression in the latter. Whenever the answer is simply in the form of denial, whether general or specific, it is of course governed by rules applicable to it alone. But so far as the answer contains defences of new matter, and *a fortiori* so far as it contains a counterclaim, or set-off, or the basis of any affirmative relief, its allegations and those of the complaint or petition must conform to the same requirements, must follow the same method. The general and essential principles of the reformed pleading now to be discussed, illustrated, and arranged in an orderly manner, apply therefore alike to the plaintiff's statement of his case for relief, and to the defendant's statement of affirmative matter, either by way of defences in confession and avoidance, or by way of cross demands against any parties to the action.

§ 517. The fundamental and most important principle of the reformed pleading, the one from which all the others are deduced as necessary corollaries, is the following: The material facts which constitute the ground of relief, or the defence of new matter (confession and avoidance), should be averred as they actually existed or took place, and not the legal effect or aspect of those facts, and not the mere evidence or probative matter by which their existence is established.² I have purposely refrained

¹ *Trustees v. Odlin*, 8 Ohio St. 298; *Jolly v. Terre Haute, &c. Co.*, 9 Ind. 421; *White v. Joy*, 18 N. Y. 83, 90; *People v. Ryder*, 12 N. Y. 433, 438, 439; *Ahern v. Collins*, 39 Mo. 145, 160.

² *People v. Ryder*, 12 N. Y. 433, 437; *Hill v. Barrett*, 14 B. Mon. 83; *Green v. Palmer*, 15 Cal. 411, 414; *Rogers v. Milwaukee*, 13 Wisc. 610, 611; *Bird v. Mayer*, 8 Wisc. 362, 367; *Horn v. Ludington*, 28

from using the common formula, "facts which constitute the cause of action," in order that the principle might be expressed

Wisc. 81, 88; *Groves v. Tallman*, 8 Nev. 178; *Pier v. Heinrichoffen*, 52 Mo. 333, 335; *Wills v. Wills*, 34 Ind. 106, 107; *De Graw v. Elmore*, 50 N. Y. 1; *Cowin v. Toole*, 31 Iowa, 518, 516; *Singleton v. Scott*, 11 Iowa, 589; *Bowen v. Aubrey*, 22 Cal. 566, 569; *Pfiffner v. Krapfel*, 28 Iowa, 27, 34; *White v. Lyons*, 42 Cal. 279, 282; *Louisville, &c. Co. v. Murphy*, 9 Bush, 522, 527; *Gates v. Salmon*, 46 Cal. 361, 379; *King v. Enterprise Ins. Co.*, 45 Ind. 43, 55; *Lytle v. Lytle*, 37 Ind. 281; *Van Schaick v. Farrow*, 25 Ind. 310; *Chicago, &c. R. R. v. North West. Un. Co.*, 38 Iowa, 877, 882; *Bowen v. Emmerson*, 38 Oreg. 452; *Cline v. Cline*, 38 Oreg. 355, 358; *Oates v. Gray*, 66 N. C. 442, 443; *Farron v. Sherwood*, 17 N. Y. 227; *Coryell v. Cain*, 16 Cal. 567, 571. I quote from some of these cases in which the general principle is fully stated, in order that the exact views of the courts may be shown, as well as the conclusions drawn from them in the text. The opinion of Marvin J. in *People v. Ryder* is exceedingly instructive, and covers most of the subordinate questions that arise in connection with the general topic. He said (p. 437): "This rule [§. 142 of the New York code] is substantially as it existed, prior to its enactment, in actions at law. Chitty says: 'In general, whatever circumstances are necessary to constitute the cause of complaint or ground of defence must be stated in the pleadings, and all beyond is surplusage; facts only are to be stated, and not arguments or inferences or matter of law, in which respect pleadings at law appear to differ materially from those in equity.' (1 Ch. Pl. 245.) At page 266 he says: 'It is a most important principle of the law of pleading, that in alleging the fact it is unnecessary to state such circumstances as tend to prove the truth of it. The dry allegation of the fact, without detailing a variety of minute circumstances which constitute the evidence of it, will suffice. The object of the pleadings is to arrive at a specific issue upon a given and material fact; and that is attained although the evidence of such fact to be laid before a jury be not

specifically developed in the pleadings.' I have supposed it safe, and a compliance with the code, to state the facts constituting the cause of action substantially in the same manner in which they were stated in the old system in a *special count*. By that system the legal issuable facts were to be stated, and the evidence by which those facts were to be established was to be brought forward upon the trial. This position will not embrace what were known as the common counts. . . . It has been supposed that a wider latitude should be allowed in equity pleading, and that evidence may to some extent be incorporated in the statement. The rule of the code is broad enough for all cases; and it permits a statement of facts and circumstances as contradistinguished from the evidence which is to establish those facts. But in all equity cases the facts may be more numerous, more complicated, more involved; and the pleader may state all these facts in a legal and concise form which constitute the cause of action, and entitle him to relief. The rule touching the statement of facts constituting the cause of action is the same in all cases; and the rules by which the sufficiency of pleadings is to be determined are prescribed by the code." How far the positions quoted from Mr. Chitty are correct is shown in the preceding paragraphs of this section. No more accurate exposition of the fundamental doctrine announced by the codes is to be found in the books than the foregoing opinion of Mr. Justice Marvin. In several of the cases to be cited the discussion has been confined to legal actions, and general statements have been made in reference to the "material" or "issuable" facts which are plainly erroneous when applied to suits brought for equitable relief. The principle as formulated by Mr. Justice Marvin embraces both species of actions, and brings them both within the purview of the statutory provision. In *Hill v. Barrett* the same fundamental principle was stated by Marshall J. in a most clear and admirable manner (p. 84): "Although the Code of Practice has abolished not

in its most comprehensive manner, and might include equitable as well as legal actions. As will be shown in the sequel, it is

only the pre-existing forms of action, but also the pre-existing forms of pleading, and has declared that henceforth the forms of pleadings and the rules by which their sufficiency is to be determined are those prescribed in the code itself, it adopts what has always been a cardinal rule with respect to the allegation of the plaintiff, now called a petition, that it must contain a statement of the facts constituting the plaintiff's cause of action. While the code contains a very few additional rules with respect to the mode or manner of alleging the facts relied upon as constituting a cause of action, it does not, and could not, particularize the facts necessary to be stated, nor give any affirmative rule more special or more instructive than that which requires that the petition shall contain the facts constituting the plaintiff's cause of action." [Here follows the passage quoted in the text of § 108, *supra* to and including the words "that the declaration must state the facts which constitute the plaintiff's cause of action;" after which the opinion proceeds as follows:] "In adopting this fundamental rule of pleading, the code must be considered as adopting also the prevailing and authoritative expositions of it as understood at the time, except so far as the code itself either expressly or by necessary implication requires facts to be stated which need not before have been stated, or dispenses with the statement of facts formerly deemed necessary. The express dispensations apply rather to the forms of statement than to the facts to be stated. The implied dispensations grow mainly out of the reduction of all actions to one form. The requisites of additional facts may be implied from the abolition of that rule which had formerly made it sufficient, and indeed proper, to state facts according to their legal effect, instead of stating them as they actually occurred, while the code seems to require by the rule that they shall be stated in ordinary language." In *Green v. Palmer*, the Supreme Court of California laid down the rules in respect to the kinds of facts which should be averred, and defined the nature

of "material" or "issuable" facts in a most exhaustive manner. From the elaborate opinion of Field C. J. the following extracts are taken (p. 414): "First rule. Facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from evidence of the facts. The facts must be carefully distinguished from the evidence of the facts. The criterion to distinguish the facts from the evidence is, — Second rule. Those facts, and those alone, must be stated which constitute the cause of action, the defence, or the reply. Therefore (1) each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. The plaintiff, on his part, must allege all that he will have to prove to maintain his action; the defendant, on his part, all that he must prove to defeat the plaintiff's title after the complaint is admitted or proved. (2) He must allege nothing affirmatively which he is not required to prove. This is sometimes put in the following form; viz., 'that those facts, and those only, should be stated which the party would be required to prove.' But this is inaccurate, since negative allegations are frequently necessary, and they are not to be proved. The rule applies, however, to all affirmative allegations, and, thus applied, is universal. Every fact essential to the claim or defence should be stated. If this part of the rule is violated, the adverse party may demur. In the second place, nothing should be stated which is not essential to the claim or defence; or, in other words, none but 'issuable' facts should be stated. If this part of the rule be violated, the adverse party may move to strike out the unessential parts. An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and, of course, need not be proved or disproved. The following question will determine in every case whether an allegation be material: Can it be made the subject of a material issue?

only in legal actions that the material or issuable facts which are to be averred "constitute the cause of action" in the strict

In other words, If denied, will the failure to prove it decide the case in whole or in part? If it will not, then the fact alleged is not material (issuable); it is not one of those which constitute the cause of action, defence, or reply." This opinion was adopted, and the mode of distinguishing "material" or "issuable" allegations was approved by the Supreme Court of Oregon in *Cline v. Cline*, 8 Oreg. 355, 358, 359. The criterion thus proposed by Mr. Chief Justice Field is perfect in its application to legal actions, but is hardly broad enough to include all cases where equitable relief is demanded, unless it was intended to embrace such cases in the language "decide the case in whole or in part." If such was the intention, the manner of stating the rule is somewhat obscure, and it clearly needs amplification and explanation. I return to this question in a subsequent paragraph of the text. *Horn v. Ludington*, 28 Wisc. 81, is an instructive decision in reference to the proper allegations to be made in an action for equitable relief. The action was equitable. The complaint averred that in 1870, and for a long time prior thereto, the defendant L. held in his own name the legal title to certain property described, for the benefit of, and in trust for, the plaintiff and three others, defendants, who, with the plaintiff, were the *cestuis que trustent*, and were entitled thereto in equal shares as tenants in common. It then alleged acts of L. in violation of his duty, and in denial of the trust. It prayed an execution of the trust by a conveyance of the property to the beneficiaries; or if that had been made impossible, then by a division of the proceeds in L.'s hands. The defendant L. moved to make this complaint more definite and certain in its averments in respect to the existence of the trust. This motion having been denied in the court below, L. appealed; and the opinion of the Supreme Court was pronounced by Lyon J., who, after quoting the provisions of the code concerning the complaint, proceeds (p. 83): "Here the cause of action is the alleged trust, the same as in a money demand on contract the debt is the cause of action. If

there be no debt, there can be no recovery; and in this action, if there is no trust, the plaintiff cannot recover. The cause of action — that is, the trust — is stated in the complaint; but the facts constituting such cause of action — namely, the facts which make L. a trustee of the plaintiff and others in respect to the property in controversy — are not therein stated. We think, therefore, that the plaintiff should have been required to make his complaint more definite and certain in this particular by stating facts which will show that L. holds the title to the property as such trustee." Some observations upon this opinion seem to be necessary. If its reasoning be correct, it leads to most important consequences. If the cause of action is stated, but not the "facts constituting the cause of action," then the complaint would have been demurrable, since the requirement is positive that such facts must be alleged, and their absence from the pleading is the principal ground of demurrer. But it cannot for a moment be claimed that this complaint would be bad on demurrer. The fundamental error of the opinion is the assumption that the trust is the cause of action. The trust is simply one fact going to constitute the cause of action. The allegation of the trust in this case was the averment of a material fact in its broadest manner and form and in its legal sense or aspect, as was done in the common-law pleadings. But the suit being equitable, and the code demanding a statement of the material facts as they occurred, and not merely an allegation of their legal view or effect, this complaint was clearly defective in this respect. While the decision was, therefore, right, the reasoning is quite misleading; at all events, it is opposed to the course of argument pursued in the great majority of reported cases. It involves, however, the doctrine, that in equitable suits the material facts necessary to be averred may be quite different in their nature from those which must be alleged in legal actions. In *Pier v. Heinrichoffen*, 52 Mo. 383, which was an action against the indorsers of a note, the

sense of the term; while in equitable actions facts may be material, and must be alleged, which, while they form the basis of

petition alleged a demand of payment at maturity, and notice of non-payment given to the defendants. At the trial the plaintiff proposed to prove facts excusing such demand and notice; and, the evidence being rejected, a verdict was rendered against him. This ruling was sustained by the Supreme Court. Ewing J., after saying that the plaintiff's mode of pleading would have been proper under the common-law system, proceeds (p. 335): "As the vice of the old system of pleading was its prolixity, its general averments and general issues, and the delay and expense inseparable from it, the new system which we have adopted has little claim to be considered a reform, unless it avoids such defects, and furnishes rules by which the great object of all pleadings is attained; viz., to arrive at a material, certain, and single issue. Hence the great improvement of our code consists in requiring the pleadings to contain a plain and concise statement of the *facts constituting* the cause of action, or matter of defence. Facts, and not evidence nor conclusions of law, must be stated. Every fact which the plaintiff must prove to maintain his suit is *constitutive* in the sense of the code." The petition in this case, it was held, should have averred the matters of excuse sought to be proved. The description here given of issuable or "constitutive" facts is appropriate to legal actions only, and must be modified in its terms in order to meet the characteristic features of many equitable suits. *Wills v. Wills*, 84 Ind. 106, is also very instructive, and contains a principle of wide application which distinguishes the present from the former theory of pleading. The action was brought to recover for the use and occupation of certain land, and the complaint was claimed to be radically defective. Downey J. said (p. 107): "The objection to the complaint is that it contains no allegation that the defendant ever *promised* to pay, or ever *agreed* to pay, or that he was *indebted* to the plaintiff. To this the appellee answers that it is not necessary to use any word

that shows an undertaking, agreement, or promise on the part of the defendant to pay rent, for none ever existed; that the complaint states facts, and, technically speaking, the law raises the implied promise to pay; that the right of action, in fact, does not stand upon any contract or agreement, but arises from principles of equity and good conscience. . . . This is not a question relating to the right to recover rent on the one hand, or the liability to pay it on the other; but it is a question of *pleading*. The question is this: Is it allowable, and is it sufficient, for the party to set forth the facts from which a promise or indebtedness may be implied? or must he allege the promise or indebtedness, and then support it at the trial by proof of the circumstances?" The judge here cites Gould on Pleading, p. 48, § 19, to the effect that a promise must always be averred in pleading in *assumpsit*, and in debt the declaration alleges that the defendant is indebted, and proceeds: "The complaint in this case is *sui generis*. We cannot classify it. It is not in *assumpsit*, for it alleges no promise; it is not in debt, for it alleges no indebtedness. But, after some examination of cases decided under codes similar to our own, we have come to the conclusion, that, tested by the code, the complaint may be sufficient. It would seem that, contrary to the rule at the common law, a party in a suit for a money demand on a contract like this, where the contract is implied, may allege the facts from which the law implies the promise; and it will be sufficient without alleging the promise or an indebtedness." He adds that it is better, however, in all cases to allege a promise. "It is always good pleading to state the legal effect of the contract, whether it be written or oral." This opinion is a striking illustration of the pertinacity with which courts have clung to the ancient notions of actions and pleading that have been entirely abrogated by the reform legislation. Although reaching a correct decision, this conclusion was evidently forced upon the judges, and was accepted by them, as it were, under protest. It actually appeared

or modify the remedy demanded, do not properly constitute the cause of action. This distinction will be fully developed in sub-

strange to them that a complaint, drawn in exact conformity with the requirements of the new procedure, should not be a declaration in assumpsit or in debt, as though the code was not enacted to produce this very result. The remark with which the quotation ends was undoubtedly true while the common-law methods prevailed; but it is exactly contrary to the whole spirit and intent of the present system: it means that a party, instead of stating the actual facts as they really occurred from which the liability called an implied contract arises, should state the legal effect of those facts, and should thus aver a fiction, as was required by the former rules of pleading. In *De Graw v. Elmore*, 50 N. Y. 1, which was an action to recover back the price paid to defendant for certain stocks alleged to have been fraudulently sold to the plaintiff, the complaint averred the fraud, the plaintiff's election to rescind, a tender of the stocks, and a demand of the price. In stating the original sale, it alleged that the purchase-price had been paid in money. On the trial, however, it appeared that the plaintiff did not pay any money, but that defendant owed him \$16,000 on a prior account growing out of contract, and that the price of the stocks, \$9,000, was paid by giving the defendant credit for so much on this existing indebtedness. Upon this evidence a motion for a nonsuit was denied, and the plaintiff had a verdict, which was set aside by the Court of Appeals. The opinion of the court, by Grover J., first states the settled rules of law as to the remedy of a party who has been induced by fraud to enter into a contract: he may affirm the contract, and bring an action for his damages; or he may rescind, — restore to the other party all he has received, and recover all he has parted with. In this case the plaintiff elected to rescind, and to recover back the money paid. "It turns out that there was no money paid, but only a credit given on a former debt; and the court below held that he could recover that amount if the other facts were proved. This was error. The contract being rescinded, the plaintiff was restored to his original

position and right. That right was to recover the account in an action upon contract. Upon the judgment so recovered the defendant could neither be arrested nor imprisoned. The credit could not be regarded as so much money paid for the purposes of this action, and, in that way, a judgment recovered which could be enforced by imprisonment. It is insisted, that, under the code, forms of action are abolished, and that the facts showing the right of action need only be stated. This is correct; but it does not aid the plaintiff. The facts are not stated. The plaintiff had a cause of action against the defendant upon an account for money advanced for him. Instead of stating this cause of action, the allegation is in substance that he paid him money as the price of stocks fraudulently sold by the defendant to the plaintiff, which contract has been rescinded by the plaintiff, and a return of the money demanded, which has been refused by the defendant. These causes of action differ in substance. The former is upon contract, the latter for tort; and the law will not permit a recovery upon the latter by showing a right to recover upon the former." In *Piffner v. Krapfel*, 28 Iowa, 27, 34, Cole J. very truly said: "Our system of pleading is essentially a fact system, intended to require the parties in judicial proceedings to state the facts of their claims, and advise the opposite party of the true nature and object of the suit. It is against the spirit and plain intent of our code to allow parties to claim as fruits of their litigation that which was not by the fair and obvious import of the pleadings put in issue and litigated between them." In the very recent case of *Louisville, &c. Canal Co. v. Murphy*, 9 Bush, 522, 527, the Kentucky Court of Appeals stated the general doctrine in the following manner: "While the ancient forms of pleading are abolished, still every fact necessary to enable the plaintiff in the action to recover must be alleged, and every essential averment required to make a declaration good at the common law upon general demurrer must be made in the petition. The facts must

sequent paragraphs which discuss the mode of pleading in equitable actions. This single and simple principle lies at the foundation of the entire reformed method introduced by the codes. When fully comprehended, it will be found to involve all the other requisites of the system. It distinguishes the new pleading from each of the three types which formerly prevailed, and which have already been described; from the modes used in the equity and the civil-law courts, by wholly dispensing with any statements of probative matter, and by limiting the averments to the fundamental facts which constitute the cause of action or the grounds of relief; and from the mode used in the common-law courts, by discarding all fictions, all technicalities, all prescribed formulas, and by requiring the material facts to be alleged as they actually existed, and not their legal effect, and still less the legal conclusions inferred from them. In discussing this fundamental principle, and developing from it the subordinate doctrines and practical rules which are involved in its general terms, its component elements must be separately examined, and the full import of each must be carefully ascertained. This analysis will lead me (1) to define the legal meaning of the term "cause of action" as used in the codes, and to point out the somewhat different senses which must be given to the phrase when it is applied to legal and to equitable actions; (2) to determine the nature of the facts which "constitute the cause of action" in each of its two significations, and in this connection to point out the difference between the "issuable facts" averred

be alleged so as to enable the opposite party to know what is meant to be proved, and also that an issue may be framed in regard to the subject-matter of dispute, and to enable the court to pronounce the law upon the facts stated. The dry allegation of the facts in the petition, without setting forth the evidence of the truth of the statements made, is all that is required." The Supreme Court of Oregon, in *Bowen v. Emmerson*, 3 Oreg. 452, applied the general principle to the complaint in an action for money due upon simple contract, and stated the essential averments of such a pleading. The facts should be alleged showing that a contract existed between the parties which had been broken; the consideration should be men-

tioned, and the promise, if express; or if there was no express promise, then the facts from which a promise upon a sufficient consideration would be implied by the law; and also the facts showing that the time for payment had expired, or that the contract had been broken in some other manner. In giving this construction to the code, the court declared that the common counts in assumpsit, as used in the old procedure, were not in accordance with these principles, and could not be resorted to. Similar quotations might be almost indefinitely multiplied; but these are sufficient to show the positions assumed by the courts in announcing the most important doctrine of the reformed pleading.

in legal actions and the facts material to the remedy but not strictly "issuable" sometimes necessary to be alleged in equitable actions, and to explain the distinction in this respect which inheres in the modes of pleading employed in these two classes of suits; and (3) to discuss the requirement that these material facts should be stated as they actually occurred or existed, and not their legal effect and meaning, and to display its full force and significance. The result of this analysis will then be applied in developing the various general rules which make up the reformed system of pleading.

§ 518. The term "cause of action" is employed by the framers of the codes in several different connections; but it must be assumed that in each of them it was intended to have the same signification, that, wherever used, it was designed to describe the same elements or features of the judicial proceeding called an action. The courts have never, so far as I have been able to discover, attempted any thorough and exhaustive discussion of the phrase, and determined its meaning by any general formula or definition; and little or no aid will therefore be obtained in this inquiry from judicial interpretation. The few decided cases which venture upon a partial description were quoted in the last preceding section. In another instance, not there referred to, in which the plaintiff alleged that the legal title to certain lands was vested in the defendant, but that these lands were held by him in trust for the plaintiff, and demanded an execution of the trust by conveyance, &c., the cause of action was decided to be "the trust;" the court declaring that in every money demand on contract "the debt" is the cause of action, and holding, that, in the case before them, the cause of action itself—the trust—was stated in the complaint, but that the facts constituting it were not averred.¹

§ 519. The true signification of the term "cause of action" was carefully examined and determined in the second section of the present chapter; and I shall not repeat the course of discussion there pursued, but shall simply recapitulate the conclusions which were reached. Every action is based upon some primary right held by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this

¹ Horn v. Ludington, 23 Wisc. 81, 83.

duty are invaded and broken ; and there immediately arises from the breach a new remedial right of the plaintiff, and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy which is obtained through means of the action, and which is its object. Now, it is very plain, that, using the words according to their natural import and according to their technical legal import, the "cause of action" is what gives rise to the remedial right, or the right of remedy, which is evidently the same as the term "right of action" frequently used by judges and text-writers. This remedial right, or right of action, does not arise from the wrongful act or omission of the defendant—the delict—alone, nor from the plaintiff's primary right, and the defendant's corresponding primary duty alone, but from these two elements taken together. The "cause of action," therefore, must always consist of two factors, (1) the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property, or contract ; and (2) the delict, or wrongful act or omission of the defendant, by which the primary right and duty have been violated. Every action when analyzed will be found to contain these two separate and distinct elements, and in combination they constitute the "cause of action." The primary right and duty by themselves are not the cause of action, because when existing by themselves, unbroken by the defendant's wrong, they do not give rise to any action. For this reason, that definition is clearly erroneous which pronounced the "debt" in an action on contract, or the "trust" in a suit to enforce a trust, to be the "cause of action." Much less can the delict or wrong by itself be the cause of action, because, without the primary right and duty of the parties to act upon, it does not create any right of action or remedial right as I have used the phrase. It is very clear from this analysis that the "cause of action" mentioned in the codes includes and consists of these two branches or elements in combination,—the primary right and duty of the respective parties, and the wrongful act or omission by which they are violated or broken.

§ 520. The first of these branches must always, from the nature of the case, be a conclusion of law. The law by its commands creates a rule applicable to certain facts and circumstances, by the operation of which, when these facts and circumstances

exist, a right arises, and is held by the plaintiff, and a corresponding duty arises and devolves upon the defendant. While this first factor of the "cause of action" is therefore always a conclusion or proposition of law, and results from the command of the supreme power in the State as its *cause*, it necessarily presupposes the existence of certain facts and events as the *occasion* of its coming into operation. A complete and exhaustive exhibition of it would thus require a statement of the legal rule itself applicable to the given condition of facts and circumstances, and of the primary right and duty arising therefrom; and also an allegation that the facts and circumstances themselves to which the rule applies, and on the occasion of which the right and duty arise, do actually exist or have existed. If this principle were adopted in pleading, every cause of action would demand a mingled averment of legal rules, of the facts and events to which they apply, and of the rights and duties resulting from the operation of the given rule upon the existing facts. In the second branch of the cause of action, there is, on the other hand, no element whatever of the law: it is simply and wholly matter of fact. It consists entirely of affirmative acts wrongfully done, or of negative omissions wrongfully suffered by the defendant; and its statement in a pleading can be nothing more than a narrative of such acts or omissions. A primary right existed in favor of the plaintiff, and a corresponding duty devolved upon the defendant, of which an integral element is a legal rule: this right and this duty, if positive, called upon the defendant to do some act towards the plaintiff, the nature of which depended upon the nature of the right and duty; if negative, they called upon the defendant to forbear from doing some act towards the plaintiff, the nature of which was determined in like manner. In the one case, the defendant's delict consists in his not doing the act which his duty obliged him to do; and in the other case, in doing the act which his duty forbade him to do. In both instances, therefore, the wrong which constitutes the second factor or branch of the cause of action is a fact more or less complex, and not either wholly or partially a legal conclusion or rule.

§ 521. Such being the general nature and signification of the term "cause of action," its different phases of meaning, when applied either to legal or to equitable actions, will next be pointed

out and described. These differences do not extend to its essential elements; they are wholly formal, and they result entirely from the external differences sometimes subsisting between legal and equitable primary rights and between legal and equitable remedies. In a legal cause of action, the primary right of the plaintiff and duty of the defendant are generally *simple* in their nature as contradistinguished from complex; that is, they call for some single, simple, and complete act or forbearance on the part of the defendant; and when broken by the defendant's delict, the remedial right and duty which arise always demand a single, simple, and complete act to be done by the defendant; namely, either the payment of a sum of money as debt or damages, or the delivery of possession of a specific chattel, or the delivery of possession of a specific tract of land, which constitute the only remedies that can be obtained by a legal action. It follows, therefore, from the nature of a legal primary right and duty and of a legal remedy, that the cause of action in a legal suit is always simple, and can be stated, and must necessarily be stated, in such a manner, that the remedial right, if it exists at all, will be shown at once in its completeness and certainty. Furthermore, the legal primary right must necessarily depend upon a few facts; and these being all indispensable to its existence, the absence of even a single one will entirely invalidate the whole cause of action, and will show that no remedial right whatsoever has arisen.

§ 522. The foregoing description does not apply to equitable actions generally, although it undoubtedly does to some. In very many, and indeed in most, equitable causes of action, not merely the facts which are the occasion of the right, but the primary rights and duties themselves of the parties, are complex: it cannot be said of them that they must either wholly exist, or must be entirely denied; they do not, in other words, demand a single specific act or omission on the part of the defendant, but a series, and often a very complicated series, of acts and omissions. In determining these primary rights and duties of the respective parties to an equitable suit, there must frequently be a settlement and adjustment of opposing claims; one must be modified by another; and, as the result, a collection of rights and duties is established inhering in each of the litigants, and embracing a great variety of particulars. In certain classes of equitable

actions, it cannot be properly said that any wrong or delict has been committed by the defendant, or any violation of the plaintiff's primary rights, unless an ignorance of those rights by all the parties, and a consequent hesitation on the part of all to act, can be deemed a technical wrong. These classes of suits are prosecuted, not because there has been any denial of right or duty, but because in the absence of an accurate knowledge of their rights, or of power to arrange and adjust them by voluntary proceedings, an appeal to the courts becomes necessary in order to solve the problem or to accomplish the adjustment. An action brought to construe a will may be mentioned as an illustration of the first class, and the ordinary suit for partition as an example of the second. Again: the remedies furnished by equity are seldom the single, simple, and complete awards of pecuniary sums, or of possession of lands or of chattels, as is the case with all legal judgments. They are complex and involved; they often consist in an adjustment and award of partial reliefs to each of the parties; they may provide for future and contingent emergencies; and they are sometimes nothing more than an authoritative determination by the court of the primary rights themselves belonging to the plaintiffs and the defendants. This sketch shows very plainly that an equitable cause of action is often very different, in its external form at least, from any legal cause of action; and although the same general principle of pleading applies to each, yet it must undergo some modification in that application. The facts constituting the cause of action are to be stated in an equitable as well as in a legal action; but facts do not constitute the equitable cause of action in the same sense nor in the same manner that they constitute the legal cause of action.

§ 523. The result thus reached leads to the second subdivision of the present inquiry; namely, the nature of the facts which constitute the cause of action when that term is applied both to legal and to equitable suits. As has already been remarked, the first branch or division of the cause of action contains three distinct elements, two of them legal, and the other of fact; the second branch consists wholly of facts; while the remedial right which flows from the two is of course a conclusion of law. If the theory of pleading required that all these elements should be expressed, then the plaintiff's complaint or petition would always comprise

the following averments: (1) The rule of law applicable to certain facts from which his primary right and the defendant's primary duty arise; (2) the existence of the facts to which such rule applies, and which are the occasion of the right and duty; (3) the primary right and duty themselves which spring from the operation of such rule upon the given facts, — these three subdivisions forming the first branch of the "cause of action;" (4) the facts constituting the violation of the primary right and duty; that is, the wrongful acts or omissions of the defendant, — this statement being the second branch of the "cause of action;" (5) the remedial right held by the plaintiff, and the remedial duty devolving upon the defendant, which result from the "cause of action," and are wholly conclusions of law. In this manner every thing which enters into the plaintiff's case, fact and law, would be spread upon the record. A bill of complaint in chancery, prior to any statutory modification, was substantially constructed upon this plan, although the various subdivisions were not so logically separated and arranged. The mode of pleading which prevailed in the superior courts of Scotland seems to have been in complete conformity with this theory.

§ 524. The reformed system, following in this respect the common-law method, dispenses with several of these elements which make up the plaintiff's entire ground for relief: it wholly rejects all the subdivisions which are mere legal rules or conclusions, and admits only those that consist of the facts to which the legal rules apply, and which are the occasion whence the conclusions arise. It assumes that the courts and the parties are familiar with all the doctrines and requirements of the law applicable to every conceivable condition of facts and circumstances, so that, when a certain condition of facts and circumstances is presented to them, they will at once perceive and know what are the primary and the remedial rights and duties of both the litigants; and this knowledge being complete and perfect, it is a useless incumbrance of the record to spread out upon it the legal propositions and inferences with which every one is assumed to be acquainted. A complaint or petition, therefore, drawn in accordance with this theory, must omit (1) the legal rule which is the direct cause of the primary right and duty, (2) the primary right and duty themselves which are the results of this rule acting upon the given facts, and (3) the remedial right and duty which accrue to the plaintiff; and it

must only state (1) the *facts* which enter into the first branch of the cause of action and are the occasion of the primary right and duty, and (2) the *facts* which constitute the defendant's wrongful act or omission, — that is, the delict which is the second branch of the cause of action. As will be seen in the sequel, a statement of the legal rule, or of the primary legal right and duty *without* the facts to which they apply, and which are the occasion for their existence, is insufficient: it alleges no cause of action, and cannot be made the basis of an issue; while such a statement *in addition to* those facts is surplusage; and, if the rules of pleading are strictly enforced, will be struck out on motion, and will, at all events, be wholly disregarded. We thus arrive at the first general doctrine in relation to the facts constituting the cause of action; namely, the facts which are among the elements of the cause of action, that is, those which are the occasion for the primary right and duty to arise, and those which form the breach of such right and duty, must be alleged, to the entire exclusion of the other elements that enter into the cause of action, — the legal rules, and the legal rights and duties of the parties.

§ 525. Before proceeding to the second general doctrine, I shall notice an apparent modification of or departure from the one just announced, which occurs in a certain class of actions. In the very great majority of instances, the complaint or petition must narrate in an express manner those facts, which, as I have shown, form an element of the first branch or division of the cause of action, — those facts to which the general rule of law applies in order to create the primary right and duty of the parties. In these cases, therefore, the pleading does actually contain, in direct and positive terms, the allegations of two distinct groups of facts: *first*, those which are the occasion of the primary right and duty; and *secondly*, those which are the breach of such right and duty, — the wrong or delict. There is nothing of fact left to be understood or assumed. In another class of cases, however, the first group of facts is not expressly averred; it is omitted; it is assumed to exist in the same manner that the legal rules are assumed; and the complaint or petition actually contains only those facts which constitute the breach, — the wrongful act or omission of the defendant. The peculiar class of actions thus mentioned do not, however, depart from or violate the theory of pleading before described, but are constructed in

exact conformity with it. The facts upon which the primary right and duty of the parties depend are omitted, because they are in accordance with the universal experience of mankind, and must therefore be presumed to exist, so that their averment, like the averment of legal rules, is unnecessary. A simple and familiar illustration is the action to recover damages for an assault and battery. The primary right of the plaintiff is the right to his own person, free from molestation or interference by any one. This right, being a legal conclusion, is of course not averred. The fact upon which it depends is simply that the plaintiff is a human being, existing and possessing the common faculties and attributes of humanity. Since this fact conforms to the universal experience, its averment in the complaint or petition is needless; it is tacitly assumed; and the pleading consists wholly in statements of the wrongful trespass committed by the defendant. Another illustration is the action for slander or libel. The facts upon which the primary right and duty of the parties depend is the existence of the plaintiff as a member of society, and as possessing a character among his fellow-men. Although the common-law declaration contained averments of the plaintiff's reputation, they are unnecessary, and the complaint or petition may contain merely an account of the defamatory words spoken or published by the defendant and the other elements of the wrong. It may be stated as a general proposition, that, in actions brought for injuries to the plaintiff's own person or character, the facts which enter into the first branch of the cause of action, and are the occasion whence the primary right and duty of the parties arise, need not be expressly averred; they are assumed to exist, and nothing but the delict need be alleged. Notwithstanding this abridgment, the pleading in such cases is based upon the same theory and governed by the same rules as the pleading in all other classes of actions.

§ 526. The second of the general doctrines included within the principle under consideration is, that, in stating the two required groups of facts, those important and substantial facts alone should be alleged which either immediately form the basis of the primary right and duty, or which directly make up the wrongful acts or omissions of the defendant, and not the details of probative matter or particulars of evidence by which these material elements are to be established. This doctrine applies to all classes of

actions, and if strictly enforced it would render the pleadings simple, and the legal issues at least clear, certain, and single. The courts have been unanimous in their announcement of the rule, and the decisions already quoted, as well as those to be cited in subsequent paragraphs, will show the variety of circumstances, allegations, and issues to which it has been applied. There can be no real difficulty, if the action is legal, in distinguishing between the facts which are material and issuable and should therefore be averred, and those which are merely probative or evidentiary and should be omitted. Since the *legal* primary right and duty are always simple, and demand from the defendant the performance or the omission of some single and well-defined act, they will always depend, for their occasion, upon a few positive, determined, and certain facts, all of which are necessary to their existence, so that neither of these facts could be modified, and much less could be omitted, without entirely defeating the right and duty, and with them the cause of action itself. The same is true of the facts which make up the defendant's delict or wrong. In order, therefore, that any given legal cause of action should exist, in order that any given remedial right or right of action should arise, these determinate, unchanged, and positive elements of fact must all conspire to produce that result, and must be alleged; they literally "constitute" the cause of action, and form the "material" or "issuable" averments spoken of by the courts. The subordinate facts, on the other hand, which make up the probative matter and the details of evidence, may vary indefinitely in their nature; and so long as they perform their function of establishing the "issuable" averments, the cause of action will not be affected. To illustrate by a very familiar example: In an action to recover damages for the breach of a written contract, the allegation that the defendant executed the agreement is material and issuable; it cannot be modified, and much less abandoned, without destroying the whole cause of action. Its denial raises a direct issue, to maintain or disprove which evidence can be offered. The subordinate probative matter by which this averment is established may vary according to the exigencies of the case, and a resort to or failure with one method will not prevent the use of another. The plaintiff might rely upon the defendant's admissions that he executed the paper, or upon the testimony of a witness who saw him

sign it, or upon the opinions of persons who are acquainted with his handwriting, and who testify that the signature is his. One or the other, or even all, of these means might be resorted to, and the material fact to be proved would remain the same. If, however, instead of directly averring that the defendant executed the written contract, the plaintiff should allege that the defendant had admitted his signature to be genuine, or that a specified individual asserts that he saw the instrument signed, or that persons familiar with his handwriting declare the signature to be his, it is plain that neither of these statements would present a material issue; that is, an issue upon which the cause of action would depend. This familiar illustration covers the whole field of legal actions. The allegations must be of those principal, determinate, constitutive facts, upon the existence of which, as stated, the entire cause of action rests, so that when denied the issue thus formed with each would involve the whole remedial right. Every legal cause of action will include two or more distinct and separate facts; and in order that these facts may be issuable, the failure to prove any one of them when denied must defeat a recovery. If this fundamental doctrine of the reformed pleading is fairly and consistently enforced in actual practice, the issues presented for trial must necessarily be simple and single. Singleness and simplicity of issues do not require that the cause should contain but one issue for the jury to decide, one affirmation and denial the determination of which disposes of the whole controversy. This result of the common-law special pleading is often described by enthusiastic admirers of the ancient system, but it was seldom if ever met with in the actual administration of justice. The issues are single when each consists of one and only one material fact asserted by the plaintiff and controverted by the defendant, of such a nature that its affirmative decision is essential to the cause of action, while its negative answer defeats a recovery. The reformed theory of pleading contemplates and makes provision for such issues; and if its provisions are faithfully carried out, the disputed questions of fact would be as sharply defined, and as clearly presented for decision to juries, as can be done by any other possible method.

§ 527. The discussion thus far of this particular doctrine has been confined to legal actions; are any modifications necessary to be made in its statement when applied to equitable suits? The

differences in form between legal causes of action and remedies on the one side and equitable causes of action and reliefs on the other have been described, and need not be repeated. By virtue of these inherent differences, the material facts which must be alleged in an equitable suit are often, in their nature and effects, quite unlike the "issuable" facts which constitute a legal cause of action. In the legal action the issuable facts are few; in the equitable suit the material facts upon which the relief depends, or which influence and modify it, are generally numerous, and often exceedingly so: in the former they are simple, clearly defined, and certain; in the latter they may be and frequently are complicated, involved, contingent, and uncertain. These are mere differences of external form, but there is another much more important, and which more nearly affects their essential nature. The legal cause of action so completely rests for its existence upon the issuable facts, that if any one of them when denied fails to be established by proof, the plaintiff's entire recovery is defeated thereby, a result which is recognized by all the judicial decisions as involved in the very definition of a legal issuable fact. An equitable cause of action *may* undoubtedly rest in like manner upon a given number of determinate facts. In general, however, as has already been fully explained, facts may exist material to the recovery in a certain aspect, or in a certain contingency, or to a certain extent, and which therefore enter into the cause of action, but which are not indispensable to some kind or measure of relief being granted to the plaintiff. These facts if established will determine the character, extent, and completeness of the remedy conferred by the court; but if they are not established, the remedy is not thereby wholly defeated; it is only in some particulars modified, limited, or abridged. Since these classes of facts assist in determining the nature, amount, and details of the relief to be awarded, they in part at least "constitute the cause of action" within the true meaning of the term, and must be alleged. While the material facts of an equitable cause of action differ in the manner thus described from the issuable facts of a legal cause of action, the single and comprehensive principle of the reformed procedure embraces and controls both classes of suits. Mere evidence, probative matter as contradistinguished from the principal facts upon which the remedial right is based, are no more to be spread upon the record

in an equitable than in a legal action. A distinction inheres in the nature of the causes of action, and from this distinction the facts material to the recovery in an equitable suit may be numerous, complicated, affecting the right of recovery partially instead of wholly, modifying rather than defeating the remedy if not established; but still they are the *material* facts constituting the cause of action, and not mere details of evidentiary or probative matter.

§ 528. The existence and necessity of this distinction between the material facts to be alleged in legal and equitable actions are fully recognized and admitted by judicial opinions of the highest authority.¹ It also prevails, I believe, universally in practice. By no judge has it been more accurately and exhaustively discussed than by Mr. Justice S. L. Selden in two early cases which, although without the binding authority of precedents, have the force of cogent and unanswerable reasoning.² With the practical conclusions in reference to the nature of the material facts that should be averred in an equitable complaint or petition at which Mr. Justice Selden arrives, I entirely concur; his course of argument upon which those conclusions are based is the same in substance which has been pursued in the foregoing paragraphs. I wholly dissent, however, from his inference that these results are not contemplated by and embraced within the single and comprehensive principle announced by the codes, that the facts constituting the cause of action, and they alone, must be stated. This inference does not follow from his argument, nor from the final positions which he reaches; it is wholly unnecessary; and it has been rejected by judges who have accepted and maintained the very doctrines concerning the nature of equitable pleading under the code which he so ably supports. It is only by giving to the phrase "facts constituting the cause of action" a narrow interpretation, which it was plainly not intended to receive, that the material facts of an equitable cause of action can be thus widely separated from the issuable facts of a legal one. Both are aptly described by the phrase which is found in all the codes. The averment of issuable facts in one class of cases, and of the material facts affecting the remedy in the other

¹ See *People v. Ryder*, 12 N. Y. 488, 487; *Horn v. Ludington*, 28 Wisc. 81, 83; *White v. Lyons*, 42 Cal. 279, 282.

² *Rochester City Bank v. Suydam*, 5 How. Pr. 216; *Wooden v. Waffle*, 6 How. Pr. 145.

class, without the details of evidence or probative matter relied upon to establish either, is a necessary consequence of the single comprehensive principle which underlies the whole reformed system.

§ 529. The third and last point remains to be considered in this general discussion. The issuable facts in a legal action, and the facts material to the relief in an equitable suit, should not only be stated to the complete exclusion of the law and the evidence, but they should be alleged as they actually existed or occurred, and not their legal effect, force, or operation. This conclusion follows as an evident corollary from the doctrine that the rules of law and the legal rights and duties of the parties are to be assumed, while the facts only which call these rules into operation, and are the occasion of the rights and duties, are to be spread upon the record. Every attempt to combine fact and law, to give the facts a legal coloring and aspect, to present them in their legal bearing upon the issues rather than in their actual naked simplicity, is so far forth an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading. The peculiar method which prevailed at the common-law has been fully described; it was undoubtedly followed more strictly and completely in certain forms of action than in others; in a few instances—as in a special action on the case—the declaration was framed in substantial conformity with the reformed theory. But in very many actions, and those in constant use, the averments were almost entirely of legal conclusions rather than of actual facts. The familiar allegations that the plaintiff had “bargained and sold,” or “sold and delivered,” that the defendant “was indebted to the plaintiff,” or “had and received money to the plaintiff’s use,” and very frequently even the averment of a promise made by the defendant, may be taken as familiar illustrations from among a great number of other similar phrases which were found in the ordinary declarations. Rejecting as it does the technicalities, the fictions, the prescribed formulas, and the absurd repetitions and redundancies, of the ancient common-law system, the new pleading radically differs from the old in no feature more important and essential than this, that the allegations must be of dry, naked, actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom, must be left

entirely to the courts. While this doctrine has been uniformly recognized as correct when thus stated in an abstract and general manner, it has sometimes been overlooked or disregarded in passing upon the sufficiency and regularity of particular pleadings. Whether those decisions which have permitted the common counts to be used as good complaints or petitions, and those which have required the promise implied by law to be expressly averred as though actually made, are in conformity with this doctrine, will be considered in subsequent paragraphs, and the various cases bearing upon the question will be cited and discussed. It is sufficient for my present purpose to state the doctrine in its general form, and to reserve its application for another portion of the chapter.

§ 530. As the foregoing analysis has been exclusively based upon the text of the codes, I shall now test the correctness of its conclusions, and illustrate the extent and application of its general doctrines, by a reference to the decided cases, following in the arrangement of the subject-matter the order already adopted. The rule that facts alone are to be stated, to the exclusion of law and of the legal rights and duties of the parties, has been uniformly accepted by the courts, and has been enforced in every variety of issues and of special circumstances. In a very recent decision, this general doctrine was expressed in the following language: "Matter of law is never matter to be alleged in pleading. No issue can be framed upon an allegation as to the law. Facts only are pleadable, and upon them without allegation the courts pronounce and apply the law. This is true alike in respect to statutes and to the common law."¹ Among the allegations which have been condemned as legal conclusions, and for that reason as forming no material issue, and which have been rejected as failing to state any element of a cause of action, the following are given as illustrations: In an action to dissolve a partnership, for an accounting, &c., the averment that on a

¹ *People v. Commissioners, &c.*, 54 N. Y. 276, 279. The question was as to the validity of a certain statute. The defendants, in their pleading, had admitted its validity, and that they were required by it to do the acts sought to be enforced by the action, and had nowhere raised any objection on the record. The adverse party claimed that this admission

precluded the defendants from raising the question at the argument. Johnson J. said: "The objection to its [this question] being raised is that the defendants have, in pleading, admitted the obligation of the law," and then adds the language quoted in the text. See also *Commonwealth v. Cook*, 8 Bush, 220, 224; *Clark v. Lineberger*, 44 Ind. 228, 229.

day named, and for a long time previous thereto, the defendant and the plaintiffs "were partners doing business under the firm name of T. & C.;"¹ in an action to restrain the removal of a county seat under a statute which was claimed to be special and therefore void, the allegation that "said act is a special law in a case where a general law of uniform operation throughout the State exists, and can be made applicable;"² in an action apparently to recover damages for the wrongful interference with the plaintiff's possession of certain land, the averment that the plaintiff "was entitled to the exclusive possession of" the premises in question;³ in an action against a subscriber to the stock of a corporation to be organized, brought to recover the amount of his subscription, an averment that the "company was legally organized, into which organization the defendant entered."⁴

§ 531. Also, in an action to recover on a policy of fire insurance, by the terms of which the sum assured did not become payable until certain acts had been done by the plaintiff as conditions precedent, an averment merely "that the whole of said sum is now due;"⁵ in an action to restrain the collection of a tax on the plaintiff's land, an allegation that the land "is by the laws of the State exempt from taxation;"⁶ in a suit to recover a stock

¹ *Groves v. Tallman*, 8 Nev. 178. A general demurrer to the complaint was sustained, the court holding that this allegation was a mere conclusion of law, and that the executed agreement of partnership should have been set forth. The decision, as it seems to me, is entirely wrong: the plaintiff had stated the issuable fact, while the court demanded the evidence: there may have been no written contract of partnership.

² *Evans v. Job*, 8 Nev. 322, the court further holding, that, when the complaint alleges a mere conclusion of law, no answer to such allegation is necessary.

³ *Garner v. McCullough*, 48 Mo. 318. The petition did not state that the plaintiff was or had ever been in possession, and failed to disclose the nature of his claim or the source of his right, the allegation quoted being the sole assertion of a right in the land. It was held that no cause of action was stated, and all evidence should be excluded at the trial, although the defendant had answered.

⁴ *Hain v. North West. Gravel R. Co.*, 41 Ind. 196. This averment was held to have raised no issue, citing *Indianapolis, &c. R. R. v. Robinson*, 85 Ind. 380.

⁵ *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264, 268. The court having decided that the complaint did not sufficiently aver a performance of the conditions precedent by the plaintiff, and so failed to state a cause of action, added: "The allegation that 'the sum is now due' may be laid out of the case, inasmuch as that is a conclusion of law merely."

⁶ *Quinney v. Stockbridge*, 33 Wis. 505. There was no other statement showing that the land was exempt; and, in order that it should be so, certain special circumstances must have existed. The averment was held to be of no force whatever, unless accompanied by allegations of the proper facts; and a preliminary injunction was therefore dissolved upon the complaint alone.

subscription to a corporation, an allegation that the party became a subscriber to the capital stock "by signing and delivering" a specified agreement ;¹ an allegation "that the title of the plaintiff to said lots by virtue of said tax sale is invalid, from an irregularity in the notice of such tax sale ;"² in an action to set aside a judgment for a tax, an allegation "that no notice was given of the said proceedings, or any of them," which resulted in the tax ;³ in an action brought to recover land claimed by inheritance from a former owner, the allegation that the plaintiff was "one of the heirs of" such former owner ;⁴ in an action on a contract where the defendant's liability depended upon the performance of certain conditions precedent by a third person, the mere allegation, without stating any performance by such person, that "the defendant neglected and refused" to perform the stipulated act on his part "according to the terms of said agreement."⁵ The law of another state or country, however, is regarded, for purposes of pleading, as matter of fact, and must be averred with so much distinctness and particularity that the court may, from the statement alone, judge of its operation and effect upon the issues presented in the cause. Thus, in an action upon a note executed and made payable in Illinois, the allegation, "that by the law of Illinois the defendant was indebted to the plaintiff in the amount of such note," was held insufficient to admit evidence of what the Illinois law is in reference to the subject-matter.⁶ In Indiana the averment, that the defendant "is indebted" to the plaintiff in a specified amount, is held to be sufficient. This ruling, however, is not based upon the general principles of pleading announced

¹ *Wheeler v. Floral Mill Co.*, 9 Nev. 254, 258. In an action against the company, it set up the demand mentioned in the text as a set-off or counter-claim, alleging the plaintiff's liability in the manner described. A judgment in favor of the defendant was reversed, because there was no averment in the answer which made out a cause of action, citing *Barron v. Frink*, 30 Cal. 486 ; *Burnett v. Stearns*, 33 Cal. 473.

² *Webb v. Bidwell*, 15 Minn. 479, 485.

³ *Stokes v. Geddes*, 46 Cal. 17.

⁴ *Larue v. Hays*, 7 Bush, 50, 58. This allegation was held not to be admitted by a failure to deny it, citing *Banks v. John-*

son, 4 J. J. Marsh. 649 ; *Currie v. Fowler*, 5 J. J. Marsh. 145.

⁵ *Wilson v. Clark*, 20 Minn. 367, 369. This was declared to be a mere conclusion of law ; and as no facts were stated from which it could be inferred, it was a nullity.

⁶ *Roots v. Merriwether*, 8 Bush, 397, 401. As a foreign law is a matter of fact, the court does not take judicial notice of it, and if different from that of the forum, and if it must be invoked in order to make out the cause of action, the particular doctrine or rule relied upon must be fully and accurately stated in the pleading. See *Woolsey v. Williams*, 34 Iowa, 418, 415.

by the codes, but upon certain short forms authorized by the legislature, which were copied from the ancient common counts in *assumpsit*.¹ Examples similar to the foregoing might be indefinitely multiplied; but these are sufficient to illustrate the action of the courts, and to show how firmly they have adhered to the doctrine that facts, and not law, must be alleged, and that the averments of legal conclusions without the facts from which they have arisen form no issues, state no causes of action, admit no evidence, and do not even support a verdict or judgment,—in short, that they are mere nullities.

§ 532. Pursuing the order before indicated, the following cases will explain and illustrate the second doctrine that the principal, material, and issuable facts must be pleaded, and not the details of evidentiary or probative matter from which the existence of the final facts is inferred. The language employed by the court in an action brought to restrain the execution of tax deeds of the plaintiff's land, on account of illegality in the proceedings, furnishes a very instructive example of such averments: "The plaintiff relied upon the absence of preliminary proceedings essential to the validity of the tax sales. But instead of averring, either of his own knowledge or upon information and belief, that such proceedings were not had, he only averred that he had searched in the proper offices for the evidence that they were had, and failed to find it. The only issue that could be made upon such an allegation would be whether he had searched and found the evidence or not, which would be entirely immaterial."² In pleading certain classes of issues, it is undoubtedly difficult sometimes to discriminate between the final facts and the probative matter. This is especially true in charging fraud, which

¹ *Johnson v. Kilgore*, 39 Ind. 147. These statutory forms, in my opinion, violate the fundamental principles of pleading adopted by the reformed procedure, more so even than the ancient common counts. This question will be particularly examined in a subsequent paragraph.

² *Rogers v. Milwaukee*, 18 Wisc. 610, 611. If the plaintiff had alleged that the proceedings in question had been omitted, the facts stated by him would have been proper evidence in support of the averment. This case exhibits very clearly

the distinction between the ultimate issuable fact which cannot be changed in order to make out a given cause of action, and the probative matter by which such fact is established, and which may vary according to the exigencies of the case. Of course the omission of the preliminary proceedings must be proved, but it could be proved by many different kinds of evidence. This distinction is a certain test by which to determine, whether any given fact is issuable and material, or is only probative.

must almost invariably consist of many different circumstances, some affirmative and some negative; but the rule should nevertheless be applied. "It is not necessary nor proper for the pleader to set out all the *minute* facts tending to establish the fraud; the ultimate facts, and not the evidence, should be pleaded."¹ An allegation of mere evidentiary matter, and not an ultimate or issuable fact, is surplusage; it need not be controverted, and is not admitted by a failure to deny. As was said in a recent decision, "the matter averred is not an ultimate fact; that is to say, a fact which is required to be stated in a complaint, and which, if not denied by the answer, would stand as admitted; but it is merely matter of evidence which might be stricken out of the complaint."² If in addition to the issuable or material facts the pleading also contains the details of evidence tending to establish them, these latter averments should be stricken out on motion as surplusage.³ There is a class of allegations which are necessary, but which are not issuable in the ordinary meaning of this term as already defined,—that is, the cause of action is not defeated by a failure to prove them as averred, and an omission to deny them does not admit their truth, but still they must be stated, and a complaint or petition would be insufficient, or at least incomplete, without them. This class includes in general the statements of time, place, value, quantity, amounts, and the like; although, under peculiar circumstances, the allegation of any one of these matters may become in every sense of the term issuable and material. Ordinarily, however, this is not so. The rule thus given prevailed in the common-law pleading, and has not been changed by the new procedure. Thus, for example, in an action for the conversion of chattels, the statement of their value is not issuable; failure to deny does not admit its truth, nor exclude evidence as to the real value.⁴

§ 533. The decisions which follow in this and one or two subsequent paragraphs are cited in order to furnish some examples of allegations which have been judicially tested and pronounced sufficient or insufficient, as the case may be. A few such particular instances will better illustrate the general doctrine of the

¹ Cowin v. Toole, 31 Iowa, 518, 516; 43; Van Schaick v. Farrow, 25 Ind. 310; Singleton v. Scott, 11 Iowa, 589. Lytle v. Lytle, 37 Ind. 281.

² Gates v. Salmon, 46 Cal. 361, 379.

⁴ Chicago, &c. R. R. v. N. W. Union

³ King v. Enterprise Ins. Co., 45 Ind. P. Co., 38 Iowa, 377, 382.

codes, and will more clearly explain the requisite form and nature of issuable and material averments than can be done by any other method, either of description or of argument. In an action upon a guaranty of a note, the objection was raised by the defendant that the complaint failed to state any cause of action. It set out a note payable to the defendant which fell due October 1, 1867, and alleged "that on the 9th of October, 1867 [after it was due], the defendant, for value received, transferred said note to the plaintiff, and then and there guaranteed the payment thereof by his written guaranty, indorsed thereon as follows: 'For value received, I hereby guarantee the payment of the within note when due, October 9, 1867;' and although said note became due and payable before the commencement of this action, yet the said makers of said note, nor the said defendant, have paid the same, nor any part thereof; that the plaintiff is the owner and holder," &c., stating the amount due, and making the usual demand of judgment. The defendant claimed that the complaint did not state a cause of action because it failed to allege that the amount due is due on the note and guaranty or on the guaranty, or from the defendant to the plaintiff, and failed to allege that the maker had not paid the note; also because the guaranty being executed after the note became due, and stipulating payment *when due*, is impossible and void. After disposing of the last objection by holding that the guaranty was payable at once, the court, by applying the rule of favorable construction prescribed by the code, pronounced the complaint sufficient.¹ In an action against a railroad company for killing the plaintiff's horses, which had strayed upon the track and been run over, the only negligence charged upon the defendant at the trial was in reference to

¹ *Gunn v. Madigan*, 28 Wisc. 158, 163, 164. The opinion of the court, after stating the positions of the defendant's counsel, proceeded: "The rule practically applied by him is, that a pleading must be construed most strictly against the pleader. He seems to have forgotten that this stern rule of the common law is repealed by the code, and in its place a more beneficent one has been enacted. Looking at the complaint in the light of this new rule, it seems to us that it states a cause of action. Indeed, we are not quite sure that it is necessary to invoke

the aid of that rule to enable us to hold that it is a good pleading. It sets out the contract and the alleged breach thereof, the interest of the plaintiff and the liability of the defendant, and demands the proper judgment. Ought we to demand more?" The only real defect of the pleading is, that, from the grammatical construction of a single clause, it does not allege that the note was not paid. "Yet the said makers of said note, nor the said defendant, have paid the same." It is thus made to aver that the makers *have* paid it

its construction and maintaining of its fences through which the animals escaped and reached the track. The sole allegation of the complaint was that the defendant "so carelessly and negligently ran and managed the said locomotive and cars, and the said railroad track, grounds, and fences, that its said locomotive and cars ran against and over the said horses." It was not even stated that the animals escaped through the fences. In pronouncing upon the sufficiency of this averment, it was said by the court that the best possible construction for the plaintiff which could be put upon the language was "that the defendant so negligently managed the *fences* that its train ran over the horses," and that, even under the liberal rule prescribed by the codes, this could not be taken as alleging a cause of action for negligently constructing the fences, or suffering them to be out of repair, so that the animals escaped through them on to the track.¹

§ 534. In an action for trespass to land, the petition stated that "plaintiff by virtue of a contract with one E. was entitled to the exclusive possession of" the premises, "that subsequently to this contract the premises were purchased by the defendant with knowledge of the plaintiff's rights, that the defendant forcibly took possession and excluded the plaintiff," but did not allege that the plaintiff was ever in possession, nor the relation which E. bore to the land, nor the terms of the contract with him, nor that defendant's acts were wrongful. This petition, it was held, stated no cause of action, and was properly dismissed at the trial.² In an action to foreclose a mortgage of land, the plaintiff obtained a preliminary injunction to restrain the removal of machinery which had been so affixed to the land as to become part of the freehold. A motion was made on the pleadings to dissolve the injunction on the ground that the complaint contained no allegations which could be made the basis of that relief. The clause relied upon by the plaintiff was the following: That the defendants had erected on the premises a manufacturing establishment, "and put therein machinery which had become part and parcel thereof," and that "among other machinery which they put therein was a steam-engine," &c., enumerating other articles. This was held to be a sufficient averment that the engine, &c., had become part of the realty. If the defendants desired a more

¹ *Antisdel v. Chicago & N. W. R. R.*, 28 Wisc. 145, 147.

² *Garner v. McCullough*, 48 Mo. 313.

explicit allegation they should have moved for that purpose, the manner of raising the objection which they had adopted being tantamount to a demurrer for want of sufficient facts.¹ The complaint, in an action on a note against the maker and indorsers, alleged several successive indorsements until it was thus indorsed and transferred to one M., but omitted to state an indorsement and transfer from him to the plaintiff. It contained, however, the following averment, "that the plaintiff is now the lawful owner and holder of the said note, and the defendants are justly indebted to him thereon," &c. This was held to be a sufficient statement of the plaintiff's title; the defect, if any, was one which should be cured by motion to make the pleading more definite and certain.² The material portion of the complaint in an action for work and labor simply stated that the plaintiff performed work "for the defendant at an agreed price of \$26 per month." It was objected on demurrer that no request on the part of the defendant was alleged, but the pleading was held to be sufficient under the rule of construction adopted by the codes.³ In an action on a town treasurer's official bond, the complaint, after setting out the bond, averred the breach thereof in the following manner, simply negating the conditions: "He has not duly and faithfully performed the duties of his office, and has not faithfully and truly accounted for and paid over according to law all the state and county taxes which came into his hands:" but it did not allege that any such taxes had ever come into his hands. This complaint was pronounced fatally defective on demurrer, as the facts constituting the breach should have been pleaded.⁴

§ 535. The petition in an action against H. as maker and C. as indorser of a note set out the note made by H. payable to bearer and a guaranty thereon, "I guarantee the payment of the within

¹ *Kimball v. Darling*, 82 Wisc. 675, 684. The allegation in question is an admirable illustration of the distinction between facts material to the remedy in equity suits and issuable facts in legal actions. A failure to prove this special averment would not defeat the cause of action; it would simply modify and limit the amount of relief to be obtained by the plaintiff; but it was certainly a necessary allegation for that purpose.

² *Reeve v. Fruker*, 82 Wisc. 248.

³ *Joubert v. Carli*, 26 Wisc. 594, per Paine J.: "The allegation, that one has performed work for another at an agreed price per month or per day, must be held to fairly import that the agreement was prior to the performance of the work, and that the work was done in pursuance of it."

⁴ *Wolff v. Stoddard*, 25 Wisc. 508, 505; *Supervisors v. Kirby*, 25 Wisc. 498. Dixon C. J. dissented in both cases.

note to C. E. [the plaintiff] or order," signed by C., and added : "The defendant H. is liable on said note as maker, and the defendant C. as indorser and guarantor. The plaintiff C. E. is the holder and owner of said note. There is due from the defendants to the plaintiff on said note the sum of," &c. On demurrer by the defendant C., he was held to be absolutely liable as a guarantor, and that under the liberal rule of construction the allegations of the complaint imported a cause of action, and were sufficient.¹ In an action by the vendee for fraudulent representations made on a sale, the complaint must allege that the plaintiff relied upon them ; and the absence of such averment will not be supplied by a statement of mere evidentiary matter tending to show the existence of that material fact, unless the evidence so stated is conclusive.² In an action brought to recover damages for the conversion of chattels, the complaint was substantially as follows: That the plaintiff was on, &c., the owner of certain chattels ; that he leased them to one S. by a written lease, in which he reserved the right to take possession of them, and to terminate the letting, whenever he should deem himself unsafe, or that the chattels were not well taken care of ; that S. took possession under the lease ; that the defendant, who is a United States marshal, seized them while thus in the possession of S. under a process in bankruptcy against S. ; that plaintiff demanded them from the defendant, who refused, &c. ; that the plaintiff demanded the possession from the defendant " on the ground that the plaintiff deemed himself unsafe, and did not think that the property was well taken care of ;" and that the defendant had converted the same to his own use. The complaint did not contain any further or more express statement that the plaintiff did

¹ *Clay v. Edgerton*, 19 Ohio St. 549. The court, after stating that the defendant C. was absolutely liable as a guarantor, added that the allegations above stated implied a transfer of the note from him to the plaintiff, and a consideration by means of such transfer. C. is thus shown to be an indorser, and is, as it appears, therefore held liable as a guarantor. This decision, in my opinion, cannot be supported on principle. It is such ruling as this that destroys the scientific character and usefulness of the reformed system, and tends to bring it into discredit.

² *Goings v. White*, 38 Ind. 125. This decision assumes that, although in accordance with the general doctrine, the principal fact and not the evidence of it should be pleaded, yet a statement of the evidence may under certain circumstances be sufficient to raise a substantial issue. If the principal fact be not alleged, but the details of evidence are given, and these are positive and conclusive in their nature, the pleading will not be bad on demurrer, although it will be subject to amendment on a motion to make it more definite and certain.

as a matter of fact deem himself unsafe. A demurrer for want of facts was sustained, and the pleading was held insufficient because it did not show a right of possession in the plaintiff when the action was brought, in that it failed to allege any fact entitling him to terminate the letting, and to resume possession of his property.¹ The petition in an action for conversion alleged that the defendant "had in his possession, and under his control, \$5,000 in money, and \$10,000 in hardware, stoves, &c., of the money and property owned by the plaintiff," and converted the same. This was declared, on a motion to make the petition more definite and certain, to be a sufficient averment that the money and goods were the property of the plaintiff.² If an action is brought on a bail bond given in a criminal proceeding, the complaint should allege that the person was released from custody upon the execution and delivery of the undertaking, and a pleading omitting this statement was held bad.³ Where a tender is essential to the plaintiff's cause of action, the complaint must either aver it in express terms, or must state a sufficient excuse for omitting it. In such a case the plaintiff alleged "that he has been ready and willing during all the time aforesaid, and has offered, to accept and take said conveyance, and to pay the balance of said purchase-money." This averment was pronounced to be insufficient, and the complaint was held bad on demurrer, as it neither stated a tender, nor an excuse for not making a tender.⁴ In actions brought to recover damages, an allegation that damages have been sustained is indispensable. As was said by the Supreme Court of California in a late decision, "it is not alleged in the complaint that the plaintiff has sustained damages, and therefore he is not entitled to judgment for damages."⁵

§ 536. The cases contained in the last three paragraphs, and from which quotations have been made, were not selected as

¹ *Hathaway v. Quinby*, 1 N. Y. S. C. 886. The construction given to the complaint in this case was certainly severe and technical, and hardly in accordance with the rule laid down in the code. The objection is for incompleteness and indefiniteness of the allegation. The plaintiff certainly does state, although perhaps in a partial manner, that he deemed himself unsafe. A motion was certainly more appropriate than a demurrer.

² *Sturman v. Stone*, 31 Iowa, 115.

³ *Los Angeles County v. Babcock*, 45 Cal. 252.

⁴ *Englander v. Rogers*, 41 Cal. 420, 422.

⁵ *Bohall v. Diller*, 41 Cal. 532. See also *Bradley v. Aldrich*, 40 N. Y. 504, and *supra*, § 84, note 3; and *comp. Graves v. Spier*, 58 Barb. 349, *supra*, § 81, note 2.

examples of proper pleading according to the principles established by the reformed procedure ; on the contrary, most of those which were sustained by the courts escaped condemnation only by applying the liberal rule of construction prescribed in the codes. These decisions are given rather to show how far a pleading may disregard the requirements as to form and method, and may violate all the principles of logical order and precision of statement, and may yet be held sufficient on general demurrer, because the material facts constituting a cause of action can be discovered among the mass of confused or imperfect allegations. The principles and doctrines of pleading adopted and enforced by the courts are illustrated and explained by such examples as these, but the cases themselves are to be carefully avoided as precedents. The mode of correcting *imperfect* and *insufficient* averments as distinguished from those which state no cause of action, and the liberal rule of construction introduced by the codes, will form the subject of a separate and careful discussion in a subsequent portion of this chapter.

§ 537. In considering the third general doctrine developed in the preceding analysis, — namely, that the facts pleaded should be stated as they actually occurred or existed, and not their mere legal aspect, effect, or operation, — two practical questions are presented, and the discussion will be mainly confined to them. These questions are, (1) whether in actions based upon the common-law notion of an implied contract the pleader should simply allege the facts as they really occurred from which the legal duty arises, without averring a promise which was never made, or whether he must or may, as in the common-law *assumpsit*, state a promise to have been expressly made which is the legal effect or operation of those facts ; and (2) whether the ancient common counts, or allegations substantially identical therewith, fulfil the requirements of the new procedure, and can be used, in conformity with its fundamental principles, as complaints or petitions in the classes of actions to which they would have been appropriate under the former system. I shall take up these questions separately, first collecting and comparing the decisions bearing upon each ; and, secondly, discussing them upon principle.

§ 538. (1) Whether in actions upon implied contract it is necessary or proper to allege a promise as made by the defendant.

There is a marked unanimity of opinion among the decisions which directly involve this question, since most of them accept the language of the codes, and fully recognize the radical change in principle effected by the reformed procedure. In *Farron v. Sherwood*,¹ after sustaining a complaint substantially a general count in assumpsit for work and labor without any averment of a promise by the defendant, the New York Court of Appeals said: "It is not necessary to set out in terms a promise to pay; it is sufficient to state facts showing the duty from which the law implies the promise. That complies with the requirement that facts must be stated constituting the cause of action." This language was not a mere dictum; it was absolutely essential to the judgment, since the complaint contained no averment of a promise, and was nevertheless held sufficient. The decision must therefore be regarded as settling the doctrine for that State. In another action to recover compensation for work and labor, where the complaint stated various services performed by the plaintiff from which it was claimed a duty on the part of the defendant arose, but alleged no promise by him, the Supreme Court of New York adopted the same rule of pleading.² On the other hand, the Supreme Court of Wisconsin said by way of a *dictum* in an early case: "Good pleading requires that a promise which the law implies should be stated."³ And in an action for services alleged in the petition to have been performed at the request of an agent of the defendant, the Supreme Court of Missouri held that either the promise must be averred, or the

¹ *Farron v. Sherwood*, 17 N. Y. 227, 280.

² *Cropsey v. Sweeney*, 27 Barb. 310, 312, per Sutherland J., who delivered the following opinion: "Although the form of the action of assumpsit, and of the pleadings therein, has been abolished, yet the obligation of contracts and the distinction between an express and an implied assumpsit remain; and notwithstanding the code, in a large class of cases now as before the code, it is only on the theory of an implied assumpsit, inferred from the conduct, situation, or mutual relations of the parties, that justice can be enforced, and the performance of a legal duty compelled. It is no longer necessary, and perhaps not even proper, in

such a case, for the plaintiff to allege in his complaint any promise on the part of the defendant, but he must state facts which, if true, according to well-settled principles of law, would have authorized him to allege, and the court to infer, a promise on the part of the defendant before the code. The form of assumpsit is no longer necessary, nor perhaps even proper, in such a case; but facts sufficient to raise it, and to put it on paper were it lawful to do so, are still necessary." He goes on to hold that the special facts alleged in the complaint raise no implied promise.

³ *Bird v. Mayer*, 8 Wisc. 362, 367. This remark was entirely *obiter*. The question before the court was, whether a warranty sued on was express or implied.

facts from which a promise will be inferred as a matter of law.¹ In Montana, the rule is distinctly established that the facts from which the promise is inferred should be pleaded, and not the promise itself; but that in an action on an express promise it must be alleged.² The Supreme Court of Indiana has held with evident reluctance that in such a case it is not necessary for the party to aver a promise, and that it is enough for him to state the facts from which the law implies it. The court added, however, after this concession, that it is better in all cases to allege a promise, saying: "It is always good pleading to state the legal effect of the contract whether it is written or oral."³ And in another case, where the action was brought for the value of goods sold, &c., the same court, while passing upon the sufficiency of a complaint which was substantially in the form of an old common count without a request or a promise averred, used the following language: "In all these instances the law implies the promise from the facts stated, and our statute simply requires the statement of facts; and if upon these facts the law implies a promise, the complaint would be good."⁴

§ 539. The question was discussed by the Supreme Court of New York in a very recent decision; and the importance of the case, and the positions taken in the opinion, make it necessary to quote from the judgment at some length. The complaint contained two counts. The second was for money had and received to the plaintiff's use. The first set out the facts in detail, stating a liability which might be considered as resulting from the tortious acts of the defendant, or might be regarded as arising from an implied contract, but omitting to aver any promise. The defendant demurred on the ground that two causes of action had been improperly joined, one on contract, and the other for a tort,—an injury to property. The plaintiff, in answer to this position, claimed that he could elect under the circumstances to sue either for tort or on contract, and that the first cause of action should be treated as of the latter kind, so that there was no misjoinder. The court, however, entirely rejected this claim; and after stating that the ancient assumpsit and case were in

¹ *Wills v. Pacific R. R.*, 35 Mo. 164.

The allegation of a performance at the request of an agent of the defendant was insufficient, being matter of evidence only.

³ *Wills v. Wills*, 84 Ind. 106, 107, 108.

See the opinion quoted at large, *supra*, § 517, note.

⁴ *Gwaltney v. Cannon*, 81 Ind. 227.

² *Higgins v. Germaine*, 1 Mont. 280.

many instances concurrent remedies for injuries to personal property; that in assumpsit the pleader must always have alleged that the defendant "undertook and promised," &c., and a breach of that promise, while in case the declaration was substantially the same except that the allegation of an undertaking and promise was omitted; that in the first count this averment is wanting, and "it is therefore *a count in case*," — proceeded as follows: "If the plaintiff is right in supposing that the law implied a promise by the bank not to satisfy the judgment after it was assigned to him, he was bound to allege that the bank undertook and promised not to satisfy, &c., in order to make it a count on contract. . . . The codifiers, while proposing to abolish the distinction between forms of action, found it impossible or impracticable in many cases to effect that object; and this case illustrates their failure in at least one class of cases. When case and assumpsit were at the common law concurrent remedies, the form of action that the pleader selected was determined, as I have shown, by the insertion or omission from the declaration of the allegation that the defendant 'undertook and promised.' This right of selection remains; and whether the action is tort or assumpsit, must be determined by the same criterion. If this is not so, then the right of election is taken away. If taken away, which of the two is left? An action on contract cannot be joined with one in tort. How are we to determine whether the action is one on contract or in tort, unless the pleader by averment alleges the making of the contract, and demands damages for a breach in the one case, or by the omission of such an averment makes it an action in tort? I know of no more certain or convenient criterion by which to determine the class to which a cause of action belongs than the one suggested. If some such rule is not established, the question of misjoinder will arise in every case in which at the common law assumpsit and case were concurrent remedies." ¹

§ 540. It is very evident from the foregoing collection of decisions that the courts have, by an overwhelming preponderance of authority, accepted the simple requirement of the codes, and

¹ Booth v. Farmers' and Mechanics' Bank, 1 N. Y. S. C., 45, 49, 50, per Mullin J. It is very remarkable that the judge makes no reference whatever to the prior

cases of Farron v. Sherwood and Cropsey v. Sweeney, which are decisive of the question involved.

have not destroyed its plain import by borrowing the notion of a fictitious promise from the common-law theory of pleading. The practical rule may be considered as settled, that, in all instances where the right of action is based upon a duty or obligation of the adverse party which the common law denominates an implied contract, it is no longer *necessary* to aver a promise, but it is enough to set out the ultimate facts from which the promise would have been inferred. This being so, we must go a step farther. If it is not *necessary* to make such an allegation, then it is not *proper* to do so; although some of the judicial opinions, from a failure to apprehend the true grounds of the rule, would seem to permit, while they do not require, the averment. A promise need not be alleged because none was ever made: the facts constituting the cause of action are alone to be stated, and this promise is not one of those facts; it is simply a legal inference, contrived for a very technical purpose to meet the requirements of form in the ancient legal actions. The same reason which shows that the averment is unnecessary demonstrates that it is improper, that it violates a fundamental doctrine of the new theory; and if an harmonious system is ever to be constructed upon the basis of the reform legislation, this doctrine should be strictly enforced.

§ 541. The only recent case which is in direct conflict with these views is the one last quoted, *Booth v. Farmers' and Mechanics' Bank*; and it seems to demand some comment. Perhaps there cannot be found in the current reports a more striking example of exalting form above substance, and of repealing an express statutory provision by judicial construction, than is shown in this decision. The learned judge virtually admits that the text of the code is opposed to his conclusions, when he assumes that the codifiers failed to accomplish the results which they intended. It may be remarked that he speaks of the statute as though it were entirely the work of the "codifiers," and he seems to ignore the authority of the legislature which made it a law. But are the common-law notion of an implied undertaking and the arbitrary requisite of alleging this fictitious promise such necessary conceptions, are they so involved in the essential nature of jurisprudence, that it is impossible or impracticable for the legislature to change or to abolish them? The very suggestion is its own answer. Nothing in our ancient law was more

thoroughly technical and arbitrary, more completely a mere matter of form, without even the shadow of substantial and necessary existence, than this very notion of a certain kind of legal liability being represented as arising from an implied promise, and the accompanying rule that the promise thus imagined must be averred as though it were actually made. It was shown in a former part of this section that the action of assumpsit was not even invented as an instrument by which to enforce the liability thus conceived of; but the fiction of an implied promise was itself contrived in order that the liability might be enforced by the already existing action of assumpsit, in which the allegation of a promise was the distinctive feature. The error of the opinion under review is, that it treats these matters of arbitrary form, these fictitious contrivances of the old pleaders, as though they subsisted in the nature of things, and were beyond the reach of legislative action. The difficulty, suggested by the learned judge, of being unable to distinguish between an action of tort and one of contract, in order that an election might be made between them, exists only in imagination. If we will look at the matter as it really is, throwing aside the old technicalities and fictions, *there is plainly no necessity for any such distinction*. If the pleader unites a cause of action upon express contract with a cause of action consisting of facts, from which under the former system a promise might have been implied, he has already made his election,—all the election that is needed,—and there would be no possibility of any subsequent change in or departure from this original theory of his complaint. The only practical difference which could ever arise from treating his second cause of action as though founded upon tort would be the power sometimes given of arresting the defendant either on mesne or final process, and this power would plainly have been surrendered. To sum up the foregoing criticism, the whole course of reasoning pursued by the learned judge assumes that the most technical arbitrary and fictitious distinctions between the ancient *forms* of action are still subsisting; it does not merely ignore the legislation which has abrogated those distinctions, but it expressly denies the ability of the legislature to accomplish such a result. This is not interpreting, it is repealing, a statute. I have dwelt upon this case longer perhaps than it intrinsically merits; but I have done so because the principles announced in it, if generally

followed, would sap the very foundations of the reformed procedure, and prevent the erection of any harmonious and symmetrical system upon the basis of its fundamental doctrines.

§ 542. (2) Whether a complaint or petition, substantially the same in its form and its allegations with the old common or general count in *assumpsit*, is in accordance with the fundamental principles of the new procedure, and can now be regarded as a good pleading. The courts have almost unanimously answered this question in the affirmative, and have held that such complaints or petitions sufficiently set forth a cause of action in the cases where the declarations which they imitate would have been proper under the former practice.¹ Notwithstanding the impos-

¹ I have collected in this note the leading cases which sustain the position in the text. *Allen v. Patterson*, 7 N. Y. 476; *Meagher v. Morgan*, 8 Kans. 372; *Clark v. Fensky*, 8 Kans. 389; *Carroll v. Paul's Executors*, 16 Mo. 226; *Brown v. Perry*, 14 Ind. 32; *Kerstetter v. Raymond*, 10 Ind. 199; *Farron v. Sherwood*, 17 N. Y. 227, 229; *Hosley v. Black*, 28 N. Y. 438; *Hurst v. Litchfield*, 89 N. Y. 377; *Green v. Gilbert*, 21 Wisc. 395; *Evans v. Harris*, 19 Barb. 416; *Grannis v. Hooker*, 29 Wisc. 65, 66, 67; *Cudlipp v. Whipple*, 4 Duer, 610; *Bates v. Cobb*, 5 Bosw. 29; *Adams v. Holley*, 12 How. Pr. 826; *Betts v. Bache*, 14 Abb. Pr. 279; *Sloman v. Schmidt*, 8 Abb. Pr. 5; *Goelth v. White*, 35 Barb. 76; *Stout v. St. Louis, &c. Co.*, 52 Mo. 342; *Curran v. Curran*, 40 Ind. 473; *Johnson v. Kilgore*, 39 Ind. 147; *Bouslog v. Garrett*, 39 Ind. 388; *Wolf v. Schofield*, 38 Ind. 175, 181; *Noble v. Burton*, 38 Ind. 206; *Higgins v. Germaine*, 1 Mont. 230; *Gwaltney v. Cannon*, 31 Ind. 227; *Fort Wayne, &c. R. R. v. McDonald*, 48 Ind. 241, 243; *Raymond v. Hanford*, 6 N. Y. S. C. 812; *Fells v. Vestvali*, 2 Keyes, 152; *Pavisich v. Bean*, 48 Cal. 364; *Wilkins v. Stidger*, 22 Cal. 231; *Abadie v. Carrillo*, 32 Cal. 172; *Merritt v. Gliddon*, 39 Cal. 559, 564. The exact position of the courts in reference to this question will be shown by a quotation from a few of these decisions. The leading case is *Allen v. Patterson*. The action was for the price of goods; and the complaint was in form a count in *indebitatus assumpsit* for goods sold and delivered.

Jewett J. said (p. 478): "The code requires that the complaint shall contain a plain and concise statement of the facts constituting the cause of action. Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated. The rule of pleading in an action for a legal remedy is the same as formerly in this, that facts, and not the evidence of facts, must be pleaded." After an analysis of the complaint, he reaches the conclusion that its averments are in conformity with these general principles. He does not notice, however, the feature which, above all others, distinguished this form of declaration in *assumpsit*, — namely, that the legal effect of the facts was stated, instead of the actual facts of the transaction; nor does he advert to the nature, as a pure conclusion of law, of the most important allegation, that "the defendant is indebted to the plaintiff." In *Grannis v. Hooker*, 29 Wisc. 65, the complaint was in form a common count for money had and received; and, on the trial, the plaintiff offered to prove that he was induced to pay over money to the defendant by the latter's false and fraudulent representations in the sale of certain lands, which was now sought to be recovered. This evidence was rejected; and, on the plaintiff's appeal, the court, by *Cole J.*, said (pp. 66, 67): "The complaint contains what, under the former system of pleading, would be called a count for

ing array of judicial authority shown by the citations in the foot-note, the courts of one or two States have refused to follow this course of decision, and have pronounced such forms of complaint or petition to be in direct conflict with the correct principles of pleading established by the codes. Although these few cases cannot be regarded as shaking, or as throwing any doubt upon, the rule so firmly established in most of the States, they may be properly cited in order that all the light possible may be thrown upon this particular question of interpretation.¹

money had and received. . . . It is claimed by the defendant that all the facts in respect to the alleged fraud should have been distinctly stated in the complaint, otherwise the plaintiff is not entitled to prove them. On the other hand, it is claimed that all it is necessary the complaint should contain is substantially an allegation that the defendant has received a certain amount of money to the use of the plaintiff, as in the old form of declaration in *indebitatus assumpsit*. We are inclined to sanction the latter view, and to hold that *the facts, which in the judgment of the law create the indebtedness or liability, need not be set forth in the complaint.*"

The complaints in several of the Indiana cases above cited were as follows: In *Curran v. Curran*, "the plaintiff says that the defendant is indebted to him in the sum of, &c., for the following-described real estate sold and conveyed to him by the plaintiff [description]; that said sum is now due and wholly unpaid, for which the plaintiff demands judgment," &c.; in *Johnson v. Kilgore*, "that said defendant is indebted to him in the sum of, &c., for work and labor done and performed, and materials furnished, wherefore," &c.; in *Bouslog v. Garrett*, "that on, &c., the defendant was indebted to the plaintiff in the sum of, &c., for money found due from said defendant to the plaintiff upon an account then stated between them, which said sum remains unpaid, wherefore," &c.; in *Wolf v. Schofield*, "that the defendant is indebted to him in the sum of, &c., for work and labor done and performed, and for materials furnished by the plaintiff for the defendant at his instance and request, wherefore," &c. These and other similar complaints were sustained by the courts of that State, not

upon any discussion of general principles, but because they were in accordance with certain short forms prescribed by the legislature, and declared by it to be sufficient. They plainly violate every essential requirement of the code itself.

¹ *Foerster v. Kirkpatrick*, 2 Minn. 210, 212; *Bowen v. Emmerson*, 3 Oreg. 452. The complaint in the first of these cases was, "that the above-named defendants are justly indebted to the plaintiff in the sum of, &c., on account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendants at the special instance and request of the defendants, wherefore," &c.; and it will be noticed that this is fuller than several of the forms before quoted, since it alleges a request. In sustaining a demurrer to this complaint, the court held it defective, because it contained (1) no statement of the time of sale, and (2) no averment that the goods were of the price or value of the sum mentioned, or that the defendants promised to pay that sum, and laid down the general doctrine in the following manner: "In actions for goods sold and delivered, it is essential that one or the other of these allegations should be made. Without it the allegation of indebtedness is a mere conclusion of law unsupported by any fact. The defendants' liability grows out of the fact that the goods were either worth the amount of the claim, or else that they promised to pay that amount. If they were worth the amount, the law implies a promise. Without one or the other of these allegations, there appears no consideration to support the pretended indebtedness." In *Bowen v. Emmerson* the Supreme Court of Oregon pronounced the use of the general count in *assumpsit* to be entirely inconsistent

§ 543. Not only have the courts in this manner sanctioned the use of the common counts as appropriate modes of setting forth the plaintiff's cause of action; they have also held that another rule of the old practice is still retained by the codes. The rule thus declared to be in force is the following: When the plaintiff has entered into an express contract with the defendant, and has fully performed on his part, so that nothing remains unexecuted but the defendant's obligation to pay, he may if he please sue upon the defendant's implied promise to make such payment, rather than upon the express undertaking of the original contract; and to that end he may resort to a complaint or petition identical with the ancient common counts; except, as has already been shown, the averment of a promise may, and according to the better opinion *should*, be omitted.¹ This doctrine is supported

with the reformed theory of pleading, and expressly refused to follow the decision made in *Allen v. Patterson*. The opinion is a clear and very strong argument in favor of the simple and natural modes of pleading provided by the codes.

¹ *Farron v. Sherwood*, 17 N. Y. 227, 229; *Hooley v. Black*, 28 N. Y. 438; *Hurst v. Litchfield*, 39 N. Y. 377; *Atkinson v. Collins*, 9 Abb. Pr. 353; *Evans v. Harris*, 19 Barb. 416; *Green v. Gilbert*, 21 Wisc. 395, an action to recover for the part performance of an express contract, the plaintiff having been prevented by sickness from completing; *Carroll v. Paul's Executors*, 16 Mo. 226; *Brown v. Perry*, 14 Ind. 32; *Kerstetter v. Raymond*, 10 Ind. 199; *Stout v. St. Louis T. Co.*, 52 Mo. 342; *Friermuth v. Friermuth*, 46 Cal. 42; *Raymond v. Hanford*, 6 N. Y. S. C. 812; *Fells v. Vestvali*, 2 Keyes, 152. In *Sussdorf v. Schmidt*, 55 N. Y. 819, 324, the complaint alleged an agreed compensation for services; but, at the trial, the plaintiff was permitted to prove their value as upon a *quantum meruit*, and this was held no error, or at most an immaterial variance; but, *per contra*, in *Davis v. Mason*, 3 Oreg. 154, it was held that in an action for services, the complaint stating an express contract to pay a stipulated sum, the plaintiff cannot prove and recover their value upon a *quantum meruit*. In *Farron v. Sherwood*, which is, perhaps, the leading case, the doctrine

was thus announced by Strong J. (p. 229):

"The case is therefore within the well-settled rule, that when there is a special agreement, and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either upon this implied assumpsit, or on the express agreement. A new cause of action, upon such performance, arises from this legal duty, in like manner as if the act done had been done upon a general request, without an express agreement. This rule is not affected by the code. The plaintiff might, as he has done, rest his action on the legal duty, and his complaint is adapted to and contains every necessary element of that cause of action."

In *Kerstetter v. Raymond*, the Supreme Court enumerated the instances in which the general or common count was a proper means of suing upon an express contract between the parties, and declared that they were all retained by the codes. These instances are, (1) when the plaintiff has fully executed, and the time of payment is passed, the measure of damages being the stipulated price; (2) when the special contract has been altered or deviated from by common consent; (3) when the plaintiff has performed a part, and has been prevented from performing the whole by the act of the defendant, or by the act of the law; (4) when the plaintiff has not fully com-

by numerous decisions in various States, and it seems to be regarded as still operative in all the circumstances to which it was applicable under the former system.

§ 544. In the face of this overwhelming array of authority, it may seem almost presumptuous even to suggest a doubt as to the correctness of the conclusions that have been reached with so much unanimity. I cannot, however, consistently with my very strong convictions, refrain from expressing the opinion, that, in all these rulings concerning the use of the common counts, the courts have overlooked the fundamental conception of the reformed pleading, and have abandoned its essential principles. This position of inevitable opposition was clearly, although unintentionally, described by one of the judges in language already quoted, when he says, "We are inclined to sanction the latter view, and to hold that the *facts* which, in the judgment of the law, create the indebtedness or liability, need *not* be set forth in the complaint." Now, the "facts which create the liability" are the "facts constituting the cause of action" which the codes expressly require to be alleged; the two expressions are synonymous; and the direct antagonism between what the court says need not be done, and what the statute says must be done, is patent. But the objection to the doctrine of these decisions does not chiefly rest upon such verbal criticism; it is involved in the very nature of the new theory when contrasted with the old methods. In every species of the common count, the averments, by means of certain prescribed formulas, presented what the pleader conceived to be the legal effect and operation of the facts instead of the facts themselves, and the most important of them was always a pure conclusion of law. The count for money had and received well illustrates the truth of this proposition. In the allegation that "the defendant was indebted to the plaintiff for money had and received by him to the plaintiff's use," the distinctive element was the phrase "money had and received to the plaintiff's use." This technical expression was not the statement of a *fact*, in the sense in which that word is used by the codes; if not strictly a pure conclusion of law, it

plied with the terms of the contract, but, professing to act under it, has done for or delivered to the other party something of value to him which he has accepted. This last doctrine is not uni-

versally accepted in the broad terms as here stated; but it is the settled rule in Indiana. See *Lomax v. Bailey*, 7 Blackf. 599.

was at most a symbol to which a certain peculiar meaning had been given. The circumstances under which one person could be liable to another for money had and received were very numerous, embracing contracts express or implied, and even torts and frauds. The mere averment, that the defendant was indebted for money had and received, admitted any of these circumstances in its support, but it did not disclose nor even suggest the real nature of the liability, the actual cause of action upon which the plaintiff relied. The reformed theory of pleading was expressly designed to abrogate forever this general mode of averment, which concealed rather than displayed the true cause of action; it requires the facts to be stated, the facts as they exist or occurred, leaving the law to be determined and applied by the court. The same is true of the common count in every one of its phases. A careful analysis would show that the important and distinctive averments were either naked conclusions of law, or the legal effect and operation of the facts expressed in technical formulas to which a particular meaning had been attached, and which were equally applicable to innumerable different causes of action. The rule which permitted the general count in assumpsit to be sometimes used in an action upon an express contract was even more arbitrary and technical, and was wholly based upon fictitious notions. The conception of a second implied promise resulting from the duty to perform the original express promise has no foundation whatever in the law of contract, but was invented, with great subtlety, in order to furnish the ground for a resort to general assumpsit instead of special assumpsit in a certain class of cases. All the reasons in its support were swept away by the legislation which abolished the distinctions between the forms of action, since it was in such distinctions alone that those reasons had even the semblance of an existence. My space will not permit this discussion to be pursued any farther, although much more might be added to the foregoing suggestions. If the principles of pleading heretofore developed in the text are true expressions of the reformed theory, the legislature certainly intended that the facts constituting each cause of action should be alleged as they actually happened, not by means of any technical formulas, but in the ordinary language of narrative; and it is, as it appears to me, equally certain that the use of the common counts as complaints or petitions is a violation of these fundamental principles.

§ 545. From the few general principles which thus constitute the simple foundation of the reformed pleading, there result as corollaries certain subordinate doctrines and practical rules, to the development and illustration of which the remaining portion of the present section will be devoted. The immediate object of these special rules is to enforce in complaints or petitions and answers a conformity with the essential principles upon which the system is based, and at the same time to procure a decision of judicial controversies upon their merits, and not upon any mere technical requirements as to form and mode. They relate to the practical methods which must be pursued in setting forth the causes of action and the defences ; and the particular subjects with which they deal are (1) insufficient, incomplete, or imperfect allegations, (2) immaterial and redundant allegations, (3) the doctrine that the cause of action or the defence proved must correspond with the one alleged. Connected with and subsidiary to these topics are the remedies provided for each, and particularly that of amendment, which the codes expressly authorize with the utmost freedom, and also the power of electing between the two modes of setting forth the same cause of action under certain circumstances either as *ex contractu* or as *ex delicto*. Preliminary, however, to the discussion thus outlined, I shall state and very briefly explain a principle which will necessarily affect its whole course, and largely determine its results, — the principle of construction as applied to the pleadings themselves.

§ 546. It was a rule of the common law firmly established and constantly acted upon, — that, in examining and deciding all objections involving either form or substance, every pleading was to be construed strongly against the pleader ; nothing could be presumed in its favor ; nothing could be added, or inferred, or supplied by implication, in order to sustain its sufficiency. This harsh doctrine, unnecessary and illogical in its original conception, and often pushed to extremes that were simply absurd, was the origin of the technicality and excessive precision, which, more than any other features, characterized the ancient system in its condition of highest development. All the codes contain the following provision, or one substantially the same : “ In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substan-

tial justice between the parties." The evident intent of the legislature in this clause was to abrogate at one blow the ancient dogma, and to introduce in its place the contrary principle of a liberal and equitable construction; that is, a construction in accordance with the general nature and design of the pleading as a whole. This mode of interpretation does not require a leaning *in favor* of the pleader in place of the former tendency against him; it demands a natural spirit of fairness and equity in ascertaining the meaning of any particular averment or group of averments from their relation and connection with the entire pleading and from its general purpose and object. The courts have uniformly adopted this view of the provision; and although in particular instances they may sometimes have departed from it, yet, in their announcement of the *theory*, they have unanimously conceded that the stern doctrine of the common law has been abolished, and that, instead thereof, an equitable mode of construction has been substituted. From the multitudes of decisions which maintain this position with more or less emphasis I select a few examples, and other illustrations will be subsequently given.

§ 547. The New York Court of Appeals, while construing a complaint, said: "The language is clearly susceptible of this interpretation; and if so, that interpretation should be given in preference to [another which was stated]. If the language admits of the latter interpretation, it may be said to be ambiguous, and that is all. It is not true, that under the code, if there be uncertainty in respect to the nature of the charge, it is to be construed strictly against the pleader. By § 159 in the construction of a pleading, its allegations must be liberally construed with a view to substantial justice."¹ The language used by the Supreme Court of Wisconsin in a similar case, is still stronger: "Contrary to the common-law rule every reasonable intendment and presumption is to be made in favor of the pleading."² The same interpretation is given to the provision in Iowa; the old dogma of leaning against the pleader is abandoned, and a liberal and equitable construction is now the rule.³ The practical force

¹ *Olcott v. Carroll*, 39 N. Y. 436, 438.

² *Morse v. Gilman*, 16 Wisc. 504, 507.

See also *Hazleton v. Union Bank*, 32 Wisc. 84, 42, 43, which holds that greater latitude of presumption is admitted to sustain a complaint, when objection to it

is not made until the trial, after issues have been formed by an answer.

³ *Shank v. Teeple*, 33 Iowa, 189, 191; *Foster v. Elliott*, 33 Iowa, 216, 228; *Gray v. Coan*, 23 Iowa, 344; *Doolittle v. Green*, 32 Iowa, 123, 124.

and operation of this principle, and how much effect it actually produces in the judicial process of construing pleadings, can best be seen by an examination of the decisions in which it has been invoked. A few of them have therefore been selected, and placed in the foot-note.¹ In a very small number of cases, however, the courts seem to have overlooked this change made by the statute, and have expressly declared that the construction must be adverse to the pleader, thus recognizing the ancient rule as still in force;² while in some others the judicial action was clearly based upon that old doctrine, although it was not formally announced in the opinions.³ Under the light of this beneficent but new principle, that pleadings are to be construed fairly, equitably, and liberally, with a view to promote the ends of justice, and not enforce any arbitrary and technical dogmas, I shall proceed to consider, in the order already indicated, the several practical rules mentioned above, which regulate the manner of setting forth the cause of action or the defence.

§ 548. I. *Insufficient, imperfect, incomplete, or informal allegations; the mode of objecting to and correcting them.* The codes clearly intend to draw a broad line of distinction between an entire failure to state any cause of action or defence, on the one side, which is to be taken advantage of either by the general demurrer for want of sufficient facts, or by the exclusion of all evidence at the trial, and the statement of a cause of action or a defence in an insufficient, imperfect, incomplete, or informal manner, which is to be corrected by a motion to render the pleading more definite and certain by amendment. The courts have, in the main, endeavored to preserve this distinction, but not always with success; since averments have sometimes been treated as merely incomplete, and the pleadings containing them have been sustained on demurrer, which appeared to state no cause of action or defence whatever; while, in other instances, pleadings have been pronounced wholly defective and therefore bad on demurrer, or incapable of admitting any evidence, the allegations of which

¹ *McGlasson v. Bradford*, 7 Bush, 250, 220, 224; *Wright v. McCormick*, 67 N. C. 252; *Joubert v. Carli*, 26 Wisc. 594; *Clay v. Edgerton*, 19 Ohio St. 549, *supra*, § 535; *Gunn v. Madigan*, 28 Wisc. 158, 164; *Robson v. Comstock*, 8 Wisc. 372, 374, 375; *Morse v. Gilman*, 16 Wisc. 504.

² *Commonwealth v. Cook*, 8 Bush,

³ For examples, see *Hathaway v. Quinby*, 1 N. Y. S. C. 386; *Doyle v. Phoenix Ins. Co.*, 44 Cal. 254; *Scotfield v. Whitelegge*, 49 N. Y. 259, 261; *Holmes v. Williams*, 16 Minn. 164, 168.

appear to have been simply imperfect or incomplete. It is undoubtedly difficult to discriminate between these two conditions of partial and of total failure; and it is utterly impossible to frame any accurate general formula which shall define or describe the insufficiency, incompleteness, or imperfectness of averment intended by the codes, and shall embrace all the possible instances within its terms. By a comparison of the decided cases, some notion, however, may be obtained of the distinction, recognized if not definitely established by the courts, between the absolute deficiency which renders a pleading bad on demurrer or at the trial, and the incompleteness or imperfection of allegation which exposes it to amendment by motion; and in this manner alone can any light be thrown upon the nature of the insufficiency which is the subject of the present inquiry.

§ 549. The true doctrine to be gathered from all the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment.¹ From the citations in the foot-note, it is

¹ *People v. Ryder*, 12 N. Y. 438; *Prindle v. Caruthers*, 15 N. Y. 425; *Flanders v. McVickar*, 7 Wisc. 372, 377; *Robson v. Comstock*, 8 Wisc. 372, 374, 375; *Kuehn v. Wilson*, 13 Wisc. 104, 107, 108; *Morse v. Gilman*, 16 Wisc. 504, 507; *Kimball v. Darling*, 32 Wisc. 675, 684; *Reeve v. Fraker*, 32 Wisc. 248; *Hazleton v. Union Bank*, 32 Wisc. 84, 42, 48; *Horn v. Ludington*, 28 Wisc. 81, 88 (a motion made and granted, — a good illustration of defective allegations added to); *Clay v. Edgerton*, 19 Ohio St. 549; *Winter v. Winter*, 8 Nev. 129 (statement of a material fact by way of recital); *Saulsbury v. Alexander*, 50 Mo. 142, 144; *Corpenney v. Sedalia*, 57 Mo. 88 (a motion in arrest of judgment not proper when a cause of action is stated however defectively); *Pomeroy v. Benton*, 57 Mo. 531, 550; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, 630; *Barthol v. Blakin*, 34 Iowa, 452;

Russell v. Mixer, 42 Cal. 475; *Slattery v. Hall*, 48 Cal. 191 (objection that a complaint is ambiguous cannot be raised under a general demurrer); *Blasdel v. Williams*, 9 Nev. 161; *Smith v. Dennett*, 15 Minn. 81; *Lewis v. Edwards*, 44 Ind. 838, 836; *Snowden v. Wilas*, 19 Ind. 10; *Lane v. Miller*, 27 Ind. 534; *Johnson v. Robinson*, 20 Minn. 189, 192; *Mills v. Rice*, 3 Neb. 76, 86, 87; *Trustees v. Odlin*, 8 Ohio St. 293, 296. A quotation from a few of these cases will show the exact position taken by the courts in reference to the extent of defect which can and must be cured by motion; and I select from among those which have discussed the subject in the most general manner. In *Prindle v. Caruthers*, 15 N. Y. 425, the complaint set out a copy of a written contract made by defendant, and reciting that, "for value received," he "promised to pay H. C. or E. C.," &c.; but it did

clear that the courts have, with a considerable degree of unanimity, agreed upon this rule, and have in most instances applied it

not, in any other manner, allege a consideration. It also stated that "the contract is, and was prior to, &c., the property of the plaintiff by purchase," but did not disclose from whom the transfer was made, nor the consideration. The defendant demurring for want of sufficient facts, the court held that the copy of the contract as set forth contained a sufficient allegation of a consideration, and added: "The remedy for all defects of this nature is by motion to make the faulty pleading more definite and certain; that proceeding has taken the place of demurrers for want of form." *Robson v. Comstock*, 8 Wisc. 872, was an action for malicious prosecution. The complaint merely alleged that the defendant, maliciously and without probable cause, procured the plaintiff to be arrested and to be imprisoned, to his damage, &c., but did not state the nature of the indictment, nor in what the charge consisted, nor even that it was false, nor that there had been a trial, nor that the plaintiff had been discharged or acquitted. The defendant answered by a general denial; and, at the trial, the plaintiff had a verdict. On appeal from the judgment, the court, by Cole J., held (pp. 874, 875) that the complaint was exceedingly defective and informal in its manner of setting out the cause of action; but it was cured by the verdict. The plaintiff must have proved a discharge or acquittal, or else he could not have obtained a verdict. The code requires a liberal construction; and the defendant should have moved that the pleading be made definite and certain by supplying the omitted averments. In *Morse v. Gilman*, 16 Wisc. 504, the complaint alleged that defendant entered into a written contract with one Merrick for grading at a specified price per cubic yard; that the work had been completed by M. according to the agreement; that there was due thereon a certain named sum; and that the demand had been assigned by M. to the plaintiff; but it did not to any further extent state the provisions of the contract. At the trial, all evidence on the part of

the plaintiff was excluded, and the complaint was dismissed. In reversing this ruling, the court, by Dixon C. J., said (p. 507): "That the contract between M. and the defendant is not set out, as it undoubtedly should have been, is not an objection which can be taken in this way. The remedy of the defendant for this defect is by motion to require the complaint to be made more definite and certain by amendment. A complaint to be overthrown by demurrer, or by objection to evidence, must be wholly insufficient. If any portion of it, or to any extent it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain, or redundant may be the mode of their treatment. Contrary to the common-law rule, every reasonable intendment and presumption is to be made in favor of the pleading; and it will not be set aside on demurrer unless it be so fatally defective, that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever;" citing and approving *Cudlipp v. Whipple*, 4 Duer, 610; *Graham v. Camman*, 5 Duer, 697; *Broderick v. Poillon*, 2 E. D. Smith, 554. In *Saulsbury v. Alexander*, 60 Mo. 142, the petition was, "Plaintiff states that defendant owes him, &c., for work done and cash lent, the particulars of which appear from the following account," &c., and concluding with a statement of the balance due, and a prayer for judgment. The defendant, making no objection to this pleading, answered, setting up only that the work had been negligently done, and that he had already paid more than its value. The plaintiff recovering at the trial, the defendant moved in arrest of judgment, on the ground that no cause of action was averred. This motion having been granted by the court below, the plaintiff appealed. The opinion of the Appellate Court, by Bliss J., proceeds as follows: "The petition is informal and defective, and there are some cases which seem to warrant the view taken by the court;

to defects and mistakes having the same general features, and have sometimes severely strained the doctrine of liberal construction in order to enforce it. Thus, if instead of alleging the issuable facts the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so exten-

but the tendency of our more recent decisions is to require all objections of form to be taken before the parties proceed to trial." After admitting that the cause of action was imperfectly stated, but that the main fact of the plaintiff's work, &c., for the defendant was admitted by the answer, which took issue merely upon the character of the labor, the opinion goes on: "Now, it is altogether unconscionable to permit him to arrest the judgment, because the charge which he admitted in full is defectively laid. When we say that a judgment should be arrested if the petition fails to show a cause of action, we speak of substantial, and not of formal, omissions. The latter are supplied by intentment, and will be presumed, after verdict, to have been proved. But when the petition shows that the plaintiff has no cause of action, then the verdict should be treated as a nullity. But if the defects are merely of omission, and if, when supplied, a complete case would be made, the omission being of facts which the jury must have found, then the judgment is a legitimate sentence of the law." In the recent case of *Pomeroy v. Benton*, 57 Mo. 581, 550, *Sherwood J.* declares the rule to be, that if the petition, however inartificially drawn, do but state a cause of action, and no objections are taken to its formal character, by demurrer or answer, or by motion to correct, then all objections are waived; and he very pertinently adds that "it seems often to be forgotten that we have a code in Missouri." The same doctrine was announced in *Elfrank v. Seiler*, 54 Mo. 184; *Russell v. State Ins. Co.*, 55 Mo. 585; and *Biddle v. Ramsey*, 52 Mo. 158. The position taken by the court in these cases, and in *Saulebury v. Alexander*, *supra*, is a wide departure from that maintained by some of the earlier decisions of the same court, which arrested judgments for the most trivial defects of the petition, equalling, if not,

indeed, surpassing, the devotion to technicality shown by the English common-law tribunals. *Blasdel v. Williams*, 9 Nev. 161, was an action to quiet title under express provisions of the statute (code, § 2507). The complaint alleged that the plaintiffs have the legal title, and are in possession; that the defendant claims an estate or interest in said land adverse to the plaintiffs' right; that defendant has no lawful interest or estate therein, or in any portion thereof, or valid claim or title thereto; with a prayer that defendant's claim might be adjudged void, and the plaintiffs' title quieted. The answer was a denial, no demurrer being interposed or motion made. This complaint being objected to, on appeal, the court held that the plaintiffs should have stated more than the mere general averments in respect to the defendant's adverse claim above quoted. They should disclose its nature, the estate which he asserts in the land, so as to show how it is prejudicial to the plaintiffs' interest, and must then negative these allegations. Nevertheless, the pleading as it stood was sufficient in the absence of a demurrer. The court said: "It is an attempt to state a cause of action, and is simply a defective statement of such cause, rather than an absolute lack thereof." This case is a very excellent illustration of the rule, and would have been perfect if the court had said that the pleading must stand in the absence of a motion to correct it, instead of "in the absence of a demurrer;" for the defect was exactly of the kind not reached by a demurrer. The court, in *Mills v. Rice*, 8 Neb. 76, 86, 87, said that when a petition is uncertain or indefinite in its allegations, when it attempts to set up a good cause of action, but the defect does not go to the length of omitting to state any cause of action, the defendant must move to correct; he cannot take advantage of it by demurrer.

sive that no cause of action at all was indicated, or if he should aver conclusions of law, in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion, and not by a demurrer. It is virtually impossible, however, to lay down a dividing-line, so that on the one side shall fall all the errors which are venial, and on the other all those which are fatal. While in most instances the courts have held that a motion is the only means of removing the defect, and therefore that a neglect to make a motion waives all objection without any reference to the stage of the cause, yet in some cases a considerable stress has been laid upon the effect of a verdict in curing the error.¹ And in certain decisions the language of the judges tends to create an unnecessary confusion, and to incorporate an additional element of doubt into the rule, which is not at best, from its very nature, capable of absolute certainty. In the cases referred to the courts have declared that if the defendant omits to move to make the pleading more definite and certain, *or to demur*, but answers and goes to trial, the objection is waived.² This form of expression is a plain departure from the rule as given above, and is self-contradictory. The very distinctive feature of the class of defects under consideration is, that they do not render a pleading demurrable, but only expose it to amendment by motion. A failure to demur is therefore entirely immaterial; it does not waive any thing, because the demurrer if resorted to would have accomplished nothing. Doubt and obscurity alone as to the true meaning and the exact force of the rule can arise from this careless use of language.

§ 550. It has even been held, that where a cause of action is so defectively set out that a demurrer for want of sufficient facts would have been sustained, but the adverse party answers

¹ See *Robson v. Comstock*, 8 Wisc. 372, 374, 375; *Hazleton v. Union Bank*, 82 Wisc. 84, 42, 43; *Clay v. Edgerton*, 19 Ohio St. 549; *Saulsbury v. Alexander*, 50 Mo. 142, 144; *Corpenny v. Sedalia*, 57 Mo. 88; *Pomeroy v. Benton*, 57 Mo. 581, 550; *Blasdel v. Williams*, 9 Nev. 161; *Smith v. Dennett*, 15 Minn. 81. In Missouri, and in a few other States, a motion in arrest of judgment is permitted by the practice under some circumstances, and the above cases, cited from that State, hold that such a motion is not proper when the petition is simply defective and imperfect in its statement of the cause of action, and should only be made when it wholly fails to set forth any cause of action; the mere imperfection is cured by the verdict.

² *Pomeroy v. Benton*, 57 Mo. 581, 550; *Blasdel v. Williams*, 9 Nev. 161; *Smith v. Dennett*, 15 Minn. 81; *Johnson v. Robinson*, 20 Minn. 189, 192.

instead, and goes to trial, the objection to the pleading is thereby waived, and evidence in its support must be admitted.¹ Other cases are directly opposed to this position, and expressly declare that if the complaint or petition fails to state any cause of action the objection is not waived, and all evidence should be excluded at the trial, even though the defendant has answered; and this ruling is in exact conformity with the provisions of all the codes regulating the use of demurrers.² The doctrine first stated is clearly erroneous, and the *dicta* or decisions which sustain it ought to be wholly disregarded; it violates the section of the codes which enacts that the absence of sufficient facts as a ground of demurrer is not abandoned by an omission to demur; and it utterly ignores the established distinction between a failure to state any cause of action and the statement of a cause of action in an imperfect and defective manner. It is only when the answer itself by some of its averments supplies the omission in a complaint or petition otherwise demurrable that the fault is cured and the objection waived by answering; mere answering instead of demurring cannot produce that effect.³ If the averments are so defective, if the omission of material facts is so great, that, even under the rule of a liberal construction, no cause of action is stated, it is not a mere case of insufficiency, but one of complete failure; and the complaint or petition should be dismissed at the trial, or a judgment rendered upon it should be reversed. A few examples are placed in the foot-note.⁴ While the general doctrine before stated, as to the nature of insufficient and defective averments, has been universally approved in the abstract, it has sometimes been departed from, and pleadings

¹ Treadway v. Wilder, 8 Nev. 91.

² Garner v. McCullough, 48 Mo. 818; Scofield v. Whitelegge, 49 N. Y. 259, 261, 262; Saulsbury v. Alexander, 50 Mo. 142, 144.

³ Scofield v. Whitelegge, 49 N. Y. 259, 261, 262; Bate v. Graham, 11 N. Y. 237; Louisville Canal Co. v. Murphy, 9 Bush, 522, 529.

⁴ Antisdel v. Chicago and N. W. R. R., 26 Wisc. 145, 147; Tomlinson v. Monroe, 41 Cal. 94 (an ambiguous and unintelligible complaint); Holmes v. Williams, 16 Minn. 164, 168. The case described in the text is that of a cause of action, good if properly pleaded, which the plaintiff

intended and attempted to set out, but which he failed to set out by reason of omissions and defects in the material allegations; and it is to be distinguished from a cause of action entirely bad in law, no matter how complete and perfect may be the averments by which it is stated. In the first case a pure question of pleading is involved, and the complaint or petition is demurrable because the rules of pleading have been *essentially* violated; in the second case a pure question of law is involved, and the complaint or petition is demurrable, although the rules of pleading have been in every respect complied with.

have been wholly condemned, which, according to the criterion established by numerous cases, set forth a cause of action, although in an incomplete and imperfect manner. Some illustrations of this strict method of decision are given in the note.¹

§ 551. II. *Redundant, immaterial, and irrelevant allegations; the mode of objecting to and correcting them.* In a legal action all matter stated in addition to the allegations of issuable facts, and in an equitable action all such matter in addition to the averments of material facts affecting the remedy, is unnecessary, and therefore immaterial and redundant. Whenever, therefore, the

¹ Scofield v. Whitelegge, 49 N. Y. 259, 261; Hathaway v. Quinby, 1 N. Y. S. C. 386; Doyle v. Phoenix Ins. Co., 44 Cal. 264, 268; Holmes v. Williams, 16 Minn. 164, 168. Scofield v. Whitelegge was an action to recover possession of a chattel. The complaint alleged that the defendant had become possessed of and wrongfully detained from the plaintiff a piano of the value of, &c., and demanded the usual judgment. The answer denied the possession of any property belonging to the plaintiff, denied the wrongful taking, and denied the plaintiff's ownership. The complaint was dismissed at the trial, on the ground that it stated no cause of action. The opinion of the New York Court of Appeals, by Folger J., after reciting the common-law rule in replevin, that the action could only be maintained by one who had the general or a special property in the chattel, that this property must have been averred in the declaration, that the action under the code takes exactly the place of the old replevin, and that the plaintiff in it must have a property in the chattel, proceeds as follows (p. 261): "Nor is it less necessary now than then for the plaintiff to aver the facts which constitute his cause of action. He must allege the facts, and not the evidence; he must allege facts, and not conclusions of law. The plaintiff here alleges that the defendant *wrongfully detains from him* the chattel. If, indeed, this be true, then it must be that the plaintiff has a general or special property in the chattel, and the right of immediate possession. But unless he has that general or special property and right of immediate possession, it cannot be true that it is wrongfully

detained from him. The last — the wrongful detention — grows from the first, — the property and right of possession. The last is the conclusion. The first is the fact upon which that conclusion is based; it is the fact which, in a pleading, must be alleged. Is not the statement of a conclusion of law, without a fact averred to support it, an immaterial statement?" This decision is certainly technical to the last degree when tested by the standard established in the codes and in other cases. The complaint was undoubtedly imperfect; but it set forth a cause of action, although in an incomplete manner. The learned judge concedes that the averment "the defendant *wrongfully detains from the plaintiff*" necessarily presupposes and implies a property and right of possession in the plaintiff. The only defect, therefore, consisted in an allegation of the evidence, or perhaps of the legal conclusion, instead of the issuable fact. The defendant was not misled; his answer shows that he understood the claim, and it raised all the issues upon which he relied. The complaint is, indeed, a striking illustration of a defective pleading, which should be corrected by motion, and not attacked by demurrer; and the opinion is a clear and convincing argument showing why such a motion ought to be granted; but it violates the liberal principle of construction, and returns to the common-law rule requiring a strict interpretation against the pleader. The facts and opinion in Hathaway v. Quinby, which is quite similar in its general character, and in Doyle v. Phoenix Ins. Co., may be found, *supra*, §§ 531, 535.

issuable facts constituting a legal cause of action, or the material facts upon which the right to equitable relief is wholly or partially based, are pleaded, all the details of probative matter by which these facts are to be established, and all the conclusions of law inferred therefrom, are plainly embraced within this description. It would not be strictly correct to say that statements of evidence or of legal conclusions are, under all circumstances, redundant. If a complaint or petition should, in violation of the principles established by the reformed procedure, allege the evidence of some issuable or material fact instead of the fact itself, or should state a conclusion of law in place of the proper fact or facts which support it, these averments would be irregular, imperfect, insufficient, and liable to correction by a motion; but they might not be necessarily redundant. If the pleading was not reformed, and if the defect was not so serious as to render it demurrable, it would be treated on the trial as sufficient; and the statement of probative matter or of legal conclusions would take the place of the issuable or material facts which ought to have been averred, and would thus become material. It is self-evident, however, that if the essential doctrines of pleading are complied with, and the proper facts constituting the cause of action, or affecting the equitable relief, are all set forth, then any detail of evidence or any conclusion of law is necessarily surplusage, and redundant. An allegation is irrelevant when the issue formed by its denial can have no connection with nor effect upon the cause of action. Every irrelevant allegation is immaterial and redundant: but the converse of this proposition is not true; every immaterial or redundant allegation is not irrelevant. This general description can only be explained and illustrated by an examination of individual cases, of which a few have been collected in the note as examples.¹

§ 552. The rule is established by the unanimous decisions of

¹ *Bowman v. Sheldon*, 5 Sandf. 657, 16 Minn. 329, 334, 335; *King v. Enterprise Ins. Co.*, 45 Ind. 43, 55; *Hynds v. Fasnacht v. Stehn*, 53 Barb. 650; *Hays*, 25 Ind. 81; *Booher v. Goldsborough*, 44 Ind. 490, 498, 499 (duplicity); *Loomis v. Powell*, 15 How. Pr. 221; *Fabricotti v. Launitz*, 3 Sandf. 743. See *Bank v. Kitching*, 7 Bosw. 664; 11 Abb. Pr. 435; *Cahill v. Palmer*, 17 Abb. Pr. 196; *Decker v. Mathews*, 12 N. Y. 813; *Gould v. Williams*, 9 How. Pr. 51; *St. John v. Griffith*, 1 Abb. Pr. 39; *O'Connor v. Koch*, 56 Mo. 253; *Clague v. Hodgson*, 8 How. Pr. 470; *Edgerton v. Smith*, 8 Duer, 614; *Sellar v. Sage*, 12 How. Pr. 531; 18 How. Pr. 230; *Lee v. Elias*, 3 Sandf. 736; *Lamoureux v. Atlant. Mut. Ins. Co.*, 8 Duer, 680.

the courts, as well as by the provision found in the codes, that the proper and only method of objecting to and correcting redundant, immaterial, or irrelevant allegations in a pleading, is a motion to strike out the unnecessary matter, and not a demurrer, nor an exclusion of evidence at the trial.¹ The new procedure thus furnishes, by means of these motions in cases of insufficiency, redundancy, or irrelevancy, a speedy and certain mode of enforcing the fundamental doctrines of pleading what it has established, and of causing the complaints or petitions and answers to present single, clear, and well-defined issues. At the same time it prevents a sacrifice of substance to form, and a decision of controversies upon technical points not involving the merits, by requiring these objections to be taken before the trial, and by regarding them as waived if the prescribed mode of remedy is not resorted to. The courts have it in their power, by encouraging these classes of motions, and by treating them as highly remedial and important, to shape the pleading into an harmonious and consistent system, constructed upon the few natural and philosophical principles which were adopted as its foundation; or they may, on the other hand, by discouraging a resort to these corrective measures, and by treating them as idle, unnecessary, or vexatious, suffer those principles to become forgotten, and to be finally abandoned, and may, thereby, lose all the benefits which were designed, and which could have been obtained from the reform.

§ 553. III. *The doctrine that the cause of action or defence proved must correspond with the one alleged.* The codes describe three grades of disagreement between the proofs at the trial and the allegations in the pleadings to which such proofs are directed: namely, (1) An immaterial variance, where the difference is so slight and unimportant that the adverse party is not misled thereby, and in which case the court will order an immediate amendment without costs, or will treat the pleading as though amended, permitting the evidence to be received and considered; (2) A material variance, where although the proof has some relation to and connection with the allegation, yet the difference is so substantial that the adverse party is misled by the averment,

¹ Loomis v. Youle, 1 Minn. 175; 80 N. Y. 655; Simmons v. Eldridge, 29 O'Connor v. Koch, 56 Mo. 253; King v. How. Pr. 809; 19 Abb. Pr. 296; Cahill Enterprise Ins. Co., 45 Ind. 43, 55; Hynds v. Palmer, 17 Abb. Pr. 196. v. Hays, 25 Ind. 81; Smith v. Countryman,

and would be prejudiced on the merits, in which case the court may permit the pleading to be amended upon terms; (3) A complete failure of proof, where the proofs do not simply fail to conform with the allegation in some particular or particulars, but in its entire scope and meaning, or, in other words, the proof establishes something wholly different from the allegations. In this case no amendment is permitted, but the cause of action or defence is dismissed or overruled.¹ In these statutory provisions the doctrine that the proofs must correspond with the allegations is, in a somewhat modified form, united with the subject of amendment, by which the minor grades of the variance may be obviated. In the present subdivision I shall consider only the former of these two topics, and shall discuss the scope and effect of the general rule, that the cause of action, or the defence as proved, must correspond with that averred in the pleading.

§ 554. The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defence relied upon by the pleader, and may thus have an opportunity of meeting and defeating it if possible at the trial. Unless the petition or complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial. The requirement, therefore, that the cause of action or the affirmative defence must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading. It frequently happens, however, and from the very nature of the case it must happen, that the facts as proved do not *exactly* agree with those alleged. To determine the effect of such a disagreement we must recur to the reason and object of the rule, and they furnish a certain and equitable test. If the difference is so slight that the adverse party has not been misled, but, in preparing to meet and contest the case as alleged, he is fully prepared to meet and oppose the one to be actually proved, then no effect whatever is produced by the variance; to impose any loss or penalty on the pleader would be arbitrary and technical. In the second place, the difference, while it does not extend to the entire cause

¹ See these provisions quoted *supra*, § 435.

of action or defence, may be so great in respect to some of its particular material facts as to have misled the adverse party, so that his preparation in connection with that particular is not adapted to the proofs which are produced. In such circumstances an amendment is proper because the variance is partial, but it is obviously equitable that terms should be imposed. Finally, if the divergence is total, that is, if it extends to such an important fact, or group of facts, that the cause of action or defence as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint or rejection of the defence is the only equitable result. It should be noticed, that, in order to constitute this total failure of proof, it is not necessary for the discrepancy to include and affect each one of the averments. A cause of action as stated on the pleadings might consist, say, of five distinct issuable or material facts; on the trial four of these might be proved as laid, while one so entirely different might be substituted in place of the fifth that the cause of action would be wholly changed in its essential nature.

§ 555. The conclusions reached in the foregoing analysis, and the reasons which support them, are fully sustained by the decided cases which constantly discriminate between the immaterial variance which is disregarded, and the total failure of proof which is fatal to the cause of action or defence. It is of course impossible to give any comprehensive formula which shall determine these two conditions; the scope and operation of the doctrine can only be learned from the decisions which have applied it, of which a few are selected as illustrations. In the following instances the variance was held to be immaterial: In an action upon a written contract which was properly set out in the complaint except that one material stipulation was omitted, but a correct copy of it had been served upon the defendant's attorney.¹ In an action against a city for injuries done to the plaintiff's house and grounds by the unlawful construction of sewers, sidewalks, &c., it was held that, if the manner of constructing the works was unlawful, the failure to allege negligence in the complaint was not material, and might be either disregarded or amended at any stage of the proceeding;² in an action upon a

¹ *Fisk v. Tank*, 12 Wisc. 276, 301.

877, 878. "The alleged variance did not

² *Harper v. Milwaukee*, 30 Wisc. 365, change the *gravamen* of the action."

warranty given in a sale of horses, where the complaint stated in general terms that the defendant warranted them to be sound, while the proof was that he warranted them to be sound as far as he knew; that they were unsound, and that he knew them to be so, the court saying that an amendment if necessary should be made at any time even by the appellate court;¹ in an action upon a warranty of quality, where the complaint set forth an express warranty, and on the trial facts were proved from which a warranty would be implied;² in an action against two defendants to recover damages for injuries done to the plaintiff's sheep by the defendants' dogs, the petition alleging that "a certain pack or lot of dogs owned by the defendants worried, &c., certain sheep of the plaintiff," while the proof showed that one of the defendants owned a portion of the dogs, and the other defendant the remainder, but there was no joint ownership;³ in an action by a husband and wife against a husband and wife for an assault and battery by the female defendant upon the female plaintiff, the petition alleging that the plaintiff Mary D. is the wife of the plaintiff, James D., and the defendant, Martha H., is wife of the defendant, Aaron H., and proof was admitted that the parties were respectively man and wife at the time of the affray;⁴ in an equitable action brought to set aside a conveyance of land made to the defendant, on the ground of his alleged fraud, and the plaintiff failed to make out a case of fraud, but did prove one of mutual mistake;⁵ in an action for work and labor stated in the complaint to have been done for an agreed compensation, but at the trial the plaintiff proved the value as upon a *quantum meruit*.⁶ The Supreme Court of North Carolina has gone so far as to hold in one case where the complaint set up a cause of action for the conversion of chattels, and the proof at the trial showed only a liability upon an implied promise for money had and received, that the plaintiff could recover, since all distinction between forms of action had been abolished, and amendments were freely allowed.⁷ This decision, as will be

¹ Chatfield v. Frost, 8 N. Y. S. C. 357.

² Giffert v. West, 88 Wisc. 617, 621; Leopold v. Vankirk, 27 Wisc. 152, 155; s. c. 29 Wisc. 548, 551. At the common law, this was the only mode of alleging an implied warranty.

³ McAdams v. Sutton, 24 Ohio St. 333.

⁴ Dailey v. Houston, 58 Mo. 361, 366.

⁵ Montgomery v. Shockey, 37 Iowa, 107, 109; Swezey v. Collins, 86 Iowa, 589, 592.

⁶ Susendorf v. Schmidt, 55 N. Y. 319, 324.

⁷ Oates v. Kendall, 67 N. C. 241. But see Parsley v. Nicholson, 65 N. C. 207, 210, which maintains the general doctrine.

seen, stands opposed to the whole current of authority in other States. The objection that the proof varies from the allegation must be taken at the trial; if omitted, then it cannot be afterwards raised on appeal.¹ The reason is obvious; when made at the trial, there is an opportunity for removing it at once by amendment.

§ 556. The following are examples of a complete failure of proof. In all these cases one cause of action was alleged by the plaintiff, and another one was proved or attempted to be proved at the trial, but was rejected by the court. The New York Court of Appeals, while passing upon the admissibility of evidence which made out a liability under implied contract, in order to sustain a complaint that charged a fraudulent transaction and sought to recover the money obtained by means of such fraud, used the following language in a recent case: "It is insisted that, under the code, forms of action are abolished, and that the facts showing the right of action need only be stated. This is correct, but it does not aid the plaintiff. The plaintiff had a cause of action against the defendant upon an account for moneys advanced for him. Instead of stating this cause of action, the allegation is in substance that he paid him money as the price of stocks fraudulently sold by defendant to plaintiff, which contract has been rescinded by the plaintiff, and a return of the money demanded, which has been refused by the defendant. These causes of action differ in substance. The former is upon contract, the latter in tort; and the law will not permit a recovery upon the latter by showing a right to recover upon the former."² It is the settled rule under the codes, contrary to that prevailing in the common-law system, that when a cause of action depends upon the performance of some act, but under certain circumstances the performance may be excused and the cause of action still remain in force, the facts showing the excuse must be alleged if the plaintiff intends to rely upon it, and not upon the performance. The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specially alleged. Thus where, in an action against indorsers, the complaint stated a demand at maturity, and notice thereof to the defendants, and on the trial the

¹ *Speer v. Bishop*, 24 Ohio St. 598.

² *De Graw v. Elmore*, 50 N. Y. 1.

plaintiff offered to prove facts which would excuse any demand, the evidence was held inadmissible, and the action was dismissed;¹ and in a similar case under a statute which required that in order to make an indorser liable due diligence must be used by the institution of a suit against the maker, or else that such a suit would be unavailing, the petition alleged that due diligence had been used by commencing a suit against the maker, in which judgment had been recovered, and an execution had been issued and returned unsatisfied; and it was held that the other alternative, the maker's insolvency, and the consequent unavailing character of a suit against him, could not be shown on the trial;² and in a similar action against the drawer of a bill or the indorser of a bill or note, when the petition avers the demand and notice in order to charge the defendant, a waiver of these steps cannot be proved,—for example, a subsequent promise by the defendant to pay the note when the steps necessary to charge him had been omitted.³

§ 557. The following are miscellaneous instances of a fatal disagreement between the cause of action pleaded and that proved on the trial: In an action to recover damages for trespass to lands, the complaint alleging that the plaintiffs were possessed of the premises; on the trial, however, it appeared that they were remainder-men not yet entitled to the possession, while the defendants were rightfully in possession, but had committed acts of waste for which they would be liable in an action properly brought. This cause of action being wholly different from that alleged, the complaint was dismissed.⁴ The petition in an action of forcible entry and detainer, stating that the defendant was holding over after the expiration of his lease, the plaintiff was not permitted to show that he obtained possession through fraud; since this would be the averment of one material fact, and the proof of another.⁵ When the complaint set forth a contract, and on the trial the plaintiff proved without objection a materially different one, and was thereupon nonsuited, the nonsuit was sustained, the court adding that the admission of the evidence without objection made no difference with the operation of the

¹ *Pier v. Heinrichhoffen*, 52 Mo. 333, 108. See also *Hudson v. McCartney*, 33 335. Wisc. 331, 346, and cases cited.

² *Woolsey v. Williams*, 34 Iowa, 413, 415.

⁴ *Tracy v. Ames*, 4 Lans. 500, 506.

⁵ *Goldsmith v. Boersch*, 28 Iowa, 351,

³ *Lumbert v. Palmer*, 29 Iowa, 104, 354.

rule.¹ And if a complaint sets forth a cause of action for a nuisance of a certain specified kind, an essentially different one cannot be proved; as, for example, in an action by a lower riparian owner for increasing the flow of a natural water-course by draining other streams into it, the plaintiff was not permitted to prove a nuisance which consisted solely in the fouling of such water-course by the defendant.² A written contract having been set out in the petition, the plaintiff cannot in place of it prove facts going to show that the defendant is estopped from denying such contract.³ When a petition stated a cause of action for work and labor done by the plaintiff for the defendant, but the proofs showed that defendant had only guaranteed the payment by other persons for services rendered to them, a recovery was held impossible.⁴ An allegation that the defendant erected a fence across a highway, and thereby obstructed it, cannot be sustained by proof that the defendant built a stone fence fifteen rods from the road, and thereby caused water to flow upon and obstruct the same, for the causes of action are different;⁵ and upon an allegation that the plaintiff did work and labor for defendant on his milldam, proof that the services were performed in harvesting grain is a fatal variance.⁶

§ 558. By far the most important distinction directly connected with this doctrine is that which subsists between causes of action *ex contractu* and those *ex delicto*. It is settled by an almost unanimous series of decisions in various States, that if a complaint or petition in terms alleges a cause of action *ex delicto*, for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient allegations, if they stood alone, to show a liability upon the contract.⁷

¹ Johnson v. Moss, 45 Cal. 515.

² O'Brien v. St. Paul, 18 Minn. 176, 181.

³ Phillips v. Van Schaick, 37 Iowa, 229, 237. It was added that if the plaintiff wishes to avail himself of an estoppel it must be specially pleaded, citing Ransom v. Stanberry, 22 Iowa, 334.

⁴ Packard v. Snell, 35 Iowa, 80, 82.

⁵ Hill v. Supervisor, 10 Ohio St. 621.

⁶ Thatcher v. Heisey, 21 Ohio St. 668.

⁷ From the great number of cases which maintain this doctrine I have selected those which are the most recent and important, and which discuss it with the greatest fulness. Walter v. Bennett, 16 N. Y. 250; Ross v. Mather, 51 N. Y. 108; De Graw v. Elmore, 60 N. Y. 1; Sager v. Blain, 44 N. Y. 445, 448; Moore

While this doctrine is firmly established, and while there is no difficulty in its application, when it is once ascertained that the cause of action is for a tort, it is not so easy, in the absence of any specific tests, and in the careless mode of pleading which is too prevalent, to determine whether the cause of action stated by the plaintiff is *ex delicto* or *ex contractu*. Under the former system, the presence or absence of certain technical formulas removed all doubt; but as these arbitrary means of distinction have been abandoned, and as pleadings frequently, in violation of true principles, combine charges of fraud, of guilty knowledge, of taking, carrying away, and conversion, and the like, with averments of undertakings and promises, and their breach, it is sometimes impossible to decide which class of allegations constitute the *gravamen* of the action, and which is to be regarded as surplusage. The decided cases will not give us much aid, for pleadings with substantially the same averments have received diametrically opposite constructions. There is thus a conflict among the decisions in reference to this subject irreconcilable upon principle, and only to be evaded by pronouncing one set of them to be erroneous. Although it is simply impossible to develop any general rule of interpretation from these cases, a few are selected as examples.

§ 559. It may be considered a settled point on principle and on authority, that the nature of the cause of action is determined by the allegations of the complaint or petition,¹ so that the inquiry need never extend beyond this first pleading in the suit. I shall first cite illustrations of causes *ex contractu*. In an action by a vendee to recover damages arising on the sale of a horse to him, the complaint, after setting forth the sale, and that the horse was in fact "wind-broken," stated that the defendant knew of this defect, and "fraudulently concealed the same with intent to deceive" the plaintiff, giving the circumstances in unnecessary detail; and that, "further to mislead and deceive the plaintiff, the defendant falsely represented and warranted to the plaintiff

v. Noble, 53 Barb. 425; *Rothe v. Rothe*, 81 Wisc. 570, 572; *Anderson v. Case*, 28 Wisc. 505, 508; *Supervisors v. Decker*, 80 Wisc. 624; *Johannesson v. Borschenius*, 35 Wisc. 131, 135; *Dean v. Yates*, 22 Ohio St. 388, 397; *Watts v. McAllister*, 33 Ind. 264. See, *per contra*, *Oates v. Kendall*, 67 N. C. 241.

¹ *Welsh v. Darragh*, 52 N. Y. 590. Although the immediate question was whether the cause was a referable one, yet the reasoning and conclusion are general. Some of the cases lay some stress upon the kind of summons used as indicative of the pleader's intention.

that the horse was sound, &c. ; that by reason of the premises the plaintiff was deceived, and was induced to purchase and pay for the horse ;" concluding with an allegation of damages and a prayer for judgment. The Superior Court of New York City held that this complaint stated a cause of action on contract for the breach of a warranty, and that all the averments of fraud must be treated as surplusage.¹ A complaint contained the following averments: that the defendants, having in their possession certain securities, the property of the plaintiff, entered into an agreement with him, whereby they promised to deliver up said securities to him ; that he had demanded the same, but the defendants wrongfully refused to deliver them, and *wrongfully disposed of and converted them to their own use*. The New York Court of Appeals pronounced this cause of action to be on contract, and not for a tort.² In another quite similar case the complaint stated that the plaintiffs, at, &c., consigned to the defendants, who were commission-merchants at, &c., certain specified articles, to be sold by them, and the net proceeds thereof remitted ; that the defendants received the goods, and sold them for a sum named ; and after deducting all expenses, there was due to the plaintiffs the sum of, &c., which they demanded of the defendants, who omitted and refused to pay the same, and have converted the same to their own use, to the damage of the plaintiffs of, &c. This cause of action was also held by the same court to be on contract, and not for a tort.³ In a more recent action brought for the price of certain bonds that had been sold to the plaintiff, and which had turned out to

¹ Quintard v. Newton, 5 Robt. 72. The plaintiff, at the trial, proved the warranty, but gave no evidence of the *scienter*, and the complaint was dismissed. The General Term held that he should have recovered, putting their decision upon the allegation of a warranty. As this averment stood alone, it would seem that it ought to have been rejected as the surplusage. This decision, in the light of more recent ones, must be regarded as erroneous: it is not, however, opposed to the leading doctrine stated in the text.

² Austin v. Rawdon, 44 N. Y. 68, 68, 69. The statement of a wrongful disposition and conversion was said to be merely the averment of a breach. There can be no doubt as to the correctness of

this decision. The central fact of the complaint was made to be the promise, and the breach was inartificially charged.

³ Conaughty v. Nichols, 42 N. Y. 83. The complaint was dismissed at the trial, on the ground that the cause of action proved was on contract, while the one pleaded was for tort. This ruling was reversed, the Appellate Court saying that the single concluding averment of a conversion should be treated as surplusage. The opinion contains an elaborate discussion of authorities. This and the preceding case are substantially alike. See also Byxhie v. Wood, 24 N. Y. 607, 610, 611, in which certain averments of fraudulent practices were held to be surplusage, and the cause of action to be on contract.

be null and void, the claim to recover was put at the trial on the ground of implied contract, — a warranty of title. The defendant moved to dismiss the complaint, because it was based upon the theory of fraud, that its allegations were of deceit and false representations. The reporter does not think best to disclose the nature of the complaint, although the entire decision turned upon it. The court held that the cause of action was on contract.¹

§ 560. The following are instances of actions *ex delicto*. In a suit growing out of the sale of a horse brought by the vendee, the complaint was, "That on, &c., at, &c., the plaintiff purchased a certain horse of the defendant for the agreed price of \$120, and paid defendant said sum; that the defendant, to induce the plaintiff to buy the said horse, falsely and fraudulently represented the said horse worth and of the value of \$120, and *guaranteed* the said horse to be sound in all respects, and wholly free from disease; that said horse was not sound or free from disease, but was unsound and diseased in this (describing), which said disease was well known to defendant at the time of the sale," &c., to the plaintiff's damage, &c. This cause of action was held by the New York Supreme Court to be for deceit, and not on a warranty.² The following case is even still stronger; for although it

¹ *Ledwich v. McKim*, 53 N. Y. 307, 316. From an examination of the record, I am able to state the exact language of the complaint. The only allegation involving the question at issue is, that on, &c., the defendants sold to the plaintiff certain bonds "purporting to be bonds of the U. S. & T. R. R. Co., and represented by said defendants to be such bonds, and to have been issued by and binding upon said R. R. Co., and that, in consideration thereof, and relying upon the representations so made," the plaintiff paid the price; that the bonds were valueless; a demand on the defendants for a repayment of the price, &c. There was no averment of knowledge on the part of the defendants, nor of an intent to deceive. This certainly falls far short of the allegations necessary to make out a case of fraud. Folger J. said (p. 316), after reciting the defendants' claim, and the averments of the complaint as given above: "But the summons is not for relief: it is for money. The complaint

avers the facts which were proven, and which make out a cause of action in contract. The presence of the averments as to the representations, even were they averred to have been false and fraudulent, do not make the action one *ex delicto*." The correctness of this decision is plain; a cause of action on contract was certainly set forth, and the statements as to representations by the defendants were not sufficient to show a liability on account of fraud. As to the allegations which must be made and proved in order to establish a cause of action for deceit, see *Meyer v. Amidon*, 45 N. Y. 169; *Oberlander v. Spiess*, 45 N. Y. 175; *Marsh v. Falker*, 40 N. Y. 562; *Marshall v. Gray*, 57 Barb. 414; *Weed v. Case*, 55 Barb. 534; *Gutchess v. Whiting*, 46 Barb. 189.

² *Moore v. Noble*, 53 Barb. 425. No *scienter* was proved, and the plaintiff recovered for a breach of warranty. The court, in reversing this ruling, said: "That the complaint is for deceit in the

was conceded that a contract was fully set forth in the pleading, yet the averments of fraud were held to fix the true character of the action. The claim was for damages arising from the sale of a horse, and sustained by the purchaser. The complaint alleged the sale; that at the time thereof the horse was lame in one leg; that defendant *warranted* and falsely and fraudulently represented that this lameness resulted from an injury to his foot, and nowhere else; that when his foot grew out he would be well, and that he had only been lame two weeks; that plaintiff, relying upon this warranty and representation, and believing them to be true, bought the horse, and paid the price [the representations were then negatived]; that the horse was lame in his gambrel joint, and had been so for a long time, all which the defendant, at the time of the sale and the making such warranty and representations, well knew; that by reason of the premises the defendant falsely and fraudulently deceived him,—to his damage of \$500. The cause of action thus stated was held to be for deceit, and not for a breach of warranty.¹

sale, wilfully and knowingly perpetrated by defendant, is manifest; to give any other construction would be to violate all the rules of language and of pleading." Also that it was necessary for the plaintiff to prove the substantial averments,—the knowledge and intent,—and that he could not recover on a contract of warranty. This case cannot be distinguished in its facts from *Quintard v. Newton*, *supra*, and implicitly overrules that decision.

¹ *Ross v. Mather*, 51 N. Y. 108. At the trial the plaintiff proved a warranty, but gave no evidence tending to show any false or fraudulent representation or intent to deceive on the part of the defendant, and was permitted to recover. Hunt J., for the Court of Appeals, said: "The complaint contains all the elements of a complaint for a fraud. It must be held to be such, unless the distinction between the two forms of action is at an end. While it contains all that is necessary to authorize a recovery upon a contract, it contains much more [reciting the allegations as above]. No allegations could have been inserted which would have more clearly constituted a case of fraud. That there was a warranty as

well as representations, or that both are alleged to have existed, does not alter the case. . . . I do not find any authorities in the courts of this State which sustain the position that this complaint may be considered as an action for a breach of warranty." He then cites *Moore v. Noble*, *supra*; *Marshall v. Gray*, 57 Barb. 414; *McGovern v. Payn*, 32 Barb. 88, all of which hold the causes of action therein stated to be fraud, and that the plaintiff must prove a *scienter*; also *Walter v. Bennett*, 16 N. Y. 250; *Belknap v. Sealey*, 14 N. Y. 148, which hold that, when the complaint alleges a cause of action for a tort, the plaintiff cannot recover on contract, and proceeds as follows: "In the present case, the plaintiff made a statement of facts which did not constitute his cause of action. The code never intended that a party who had failed in the performance of a contract merely should be sued for a fraud; or that a party who had committed a fraud should be sued for a breach of contract, unless the fraud was intended to be waived. The two causes of action are entirely distinct; and there can be no recovery as for a breach of contract when a fraud is the basis of the complaint. *Conaughty v. Nichols*, 42

§ 561. The doctrine that a cause of action *ex contractu* cannot be proved at the trial when the complaint or petition states one *ex delicto* has been applied to the following classes of cases: where the complaint alleged improper, careless, and negligent conduct, and concealment of material facts by the defendant;¹ where the complaint was for the conversion of goods or moneys, and the plaintiff, at the trial, relied upon the breach of an implied contract for money had and received;² where the suit was brought to recover the possession of personal property, and the cause of action as proved was for money had and received, or money due upon a general indebtedness;³ and finally where a case of deceit and fraudulent representations was stated, and the proof established the breach of a contract.⁴ In addition to the general doctrine, that a party should be fully and truly apprised of the nature of the claim set up against him, there is a special reason why the plaintiff cannot recover for a breach of contract

N. Y. 88, is the only authority cited to the contrary, and it does not sustain that position."

¹ *Rothe v. Rothe*, 81 Wisc. 570, 572. The court further held that the rule must be applied, even though the allegations of tort failed to state a sufficient ground for a recovery, if they were enough to determine the nature of the cause of action.

² *Anderson v. Case*, 28 Wisc. 505, 508; *Supervisors v. Decker*, 80 Wisc. 624; *Johannesson v. Borschenius*, 35 Wisc. 181, 135; *Walter v. Bennett*, 16 N. Y. 250. In *Anderson v. Case*, Lyon J. said (p. 508): "The plaintiffs contend, however, that, although they have failed to establish their right to recover in *this* form of action for the conversion of the property, they have proved their right to recover the proceeds of the sale thereof in an action for money had and received, and that therefore the verdict and judgment should not be disturbed. . . . The distinction between an action for the wrongful conversion of property and an action for money had and received is not merely technical or formal, but is a substantial one. The former is an action *ex delicto*, the latter *ex contractu*. In the one, execution goes against the body, in the other against the property only, of the defendant. The defendants in this action are

liable to be imprisoned by virtue of an execution issued upon the judgment against them; while they would not be so liable were this an action for money had and received." The opinion of Dixon C. J. in *Supervisors v. Decker* is the most elaborate, and one of the most able and exhaustive discussions on the nature of pleading in general under the reformed system to be found in the reports.

³ *Sager v. Blain*, 44 N. Y. 445, 448, 450.

⁴ *De Graw v. Elmore*, 60 N. Y. 1; *Ross v. Mather*, 51 N. Y. 108; *Moore v. Noble*, 53 Barb. 425; *Watts v. McAllister*, 38 Ind. 264; *Dean v. Yates*, 22 Ohio St. 888, 897. When a complaint sets out a cause of action upon contract, and not for tort, as, for example, to recover money had and received by the defendant to the plaintiff's use, any averments as to the nature of the defendant's employment showing that it was of a fiduciary character, and the like, are wholly immaterial; they form no part of the cause of action, and are not issuable. Where no order of arrest has been granted in such an action, the judgment cannot be enforced by a body execution; and a clause in the judgment permitting a body execution will be struck out on appeal. *Prouty v. Swift*, 51 N. Y. 594, 601.

when the cause of action stated in the record is for deceit or any other tort. In many actions of tort the defendant may be taken on a body execution, issued upon the judgment; while a simple breach of contract never exposes him to that liability. If, therefore, a cause of action on contract could be proved and judgment thereon recovered when one for tort was alleged, the record might show a case for arrest on final process, although the issues actually tried involved no such consequence.¹

§ 562. I shall conclude this subdivision by quoting some passages from the most able and practically instructive opinion of Mr. Chief Justice Dixon in the case of *Supervisors v. Decker*.² The whole theory of pleading is discussed in this elaborate judgment; but it is peculiarly appropriate in connection with the subjects of insufficiency, redundancy, and immateriality of allegations. "It would certainly," he said, "be a most anomalous and hitherto unknown condition of the law of pleading, were it established that the plaintiff could file a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon a money demand upon contract, and one in equity, all combined or fused and moulded into one count, so that the defendant must await the events of the trial, and until the plaintiff's proofs are all in, before being informed with any certainty or definiteness what he was called upon to meet. The proposition that a complaint or any single count of it may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say strikes us as something exceedingly novel in the rules of pleading. We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion. The defendant supposes the complaint herein to be

¹ This special reason for the rule is alluded to in several of the foregoing cases.

² *Supervisors v. Decker*, 80 Wisc. 624, 626. The action was brought to recover money of the county alleged to have been converted by the defendant to his own

use, he being Clerk of the Board of Supervisors. The complaint contained averments of fraud, of negligence, of conversion, and of contract. A demurrer to it having been overruled, the defendant appealed.

intended to be one in trover, charging or seeking to charge the defendant with the wrongful conversion of certain moneys which came into his hands as a public officer, and which belonged to the plaintiff; and acting upon such supposition, he has demurred to the complaint as not stating facts sufficient to constitute that cause of action. In answer to this view, the plaintiffs rather concede than otherwise that the complaint is and was intended to be one in tort for the conversion; but at the same time they insist, that, if it is not good as a complaint of that kind, it is sufficient as a complaint or count in an action for money had and received; and, being sufficient for that purpose, they argue that the demurrer was properly overruled. In other words, their position is, that it is a question now open to speculation and inquiry on this demurrer, whether upon all or any of the facts stated in the complaint taken collectively or separately, or even by severing the allegations themselves so as to eliminate or discard certain portions of them as surplusage, a cause of action of any kind is or can be made out; and if it be found that it can, then the demurrer should be overruled. To show that the complaint may be upheld as one for money had and received for the use of the plaintiff, and the action considered as one of that kind, counsel gravely contend that the averments that the defendant made fraudulent representations, and acted falsely, fraudulently, and wrongfully in claiming and withholding the moneys, and that he converted the same, &c., may be disregarded, and rejected as surplusage.

§ 563. "In support of this position, counsel cited several New York decisions, and some in this court where *after trial and judgment, or after issue has been taken on the merits, or after the trial has commenced and the plaintiff's case is closed*, it has been held that such allegations may be disregarded. The decisions were in actions like the present, and others involving a somewhat similar question under the circumstances above stated, and were made in favor of a good cause of action proved or proposed to be, and which, by a fair and reasonable interpretation of the pleadings could be said to be within the scope of them, or to be fairly mapped out and delineated by the averments, so that the defendant was apprised of the demand made against him, and of the facts relied upon to establish it. The great liberality of the code and the broad powers of amendment conferred and enforced

upon the courts under such circumstances are well known [citing provisions in reference to amendments, variances, and the interpretation of pleadings]. These provisions for the most part, if not entirely, relate to the proceedings in an action after issue joined on the merits upon or after trial, or after judgment on the merits, when the facts are made to appear, and the substantial rights of the parties are shown. They are enacted in amplification and enlargement of the rules of the common law on the same subject, by which it is well understood that there were many defects, imperfections, and omissions constituting fatal objections on demurrer, which were waived after issue joined, and a trial or verdict and judgment on the merits. The cases cited by counsel are all of them manifestly such as fall within these provisions and rules, and none of them touch or have any bearing upon the question or case here presented. No case arising upon demurrer to the complaint is cited, and it is believed none can be, holding any such doctrine as that contended for.¹

§ 564. "It thus appears that the authorities relied upon do not sanction the position that a complaint in the first instance, and when challenged by demurrer, may be uncertain and ambulatory, purposely so made, now presenting one face to the court and now another, at the mere will of the pleader, so that it may be regarded as one in tort or one on contract or in equity, as he is pleased to name it, and as the necessities of the argument may require, and, if discovered to be good in any of the phases which it may thus be made to assume, that it must be upheld in that aspect as a proper and sufficient pleading by the court. As already observed, the opinion of the court is quite to the contrary. We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed,

¹ The learned judge cites the following cases as illustrations: *Barlow v. Scott*, 24 N. Y. 40; *Byxhie v. Wood*, 24 N. Y. 607; *Austin v. Rawdon*, 44 N. Y. 68; *Greason v. Keteltas*, 17 N. Y. 491; *Emery v. Pease*, 20 N. Y. 62; *Conaughty v. Nichols*, 42 N. Y. 88; *Wright v. Hooker*, 10 N. Y. 51; *Walter v. Bennett*, 16 N. Y. 250; *Stroebe v. Fehl*, 22 Wisc. 347; *Hopkins v. Gilman*, 22 Wisc. 481; *Tenney v. State Bank*, 20 Wisc. 152; *Leonard v. Rogan*, 20 Wisc. 540; *Samuels v. Blanchard*, 25 Wisc. 329; *Vilas v. Mason*, 25

Wisc. 310, 323. It is certain that the decision in some of these cases is not based upon the doctrine stated by the judge,—that is, upon any ground of amendment or of waiving the objection by answering, &c.; but it is put upon the broad and fundamental principle, that, under the codes, equitable and legal reliefs may be granted in the same action, or one may be granted when the other is demanded: the other cases, however, fully sustain the position taken by the opinion.

and from their very nature cannot be.¹ These distinctions continuing, they must be regarded by the courts now as formerly; and now no more than then, except under the peculiar circumstances above noted, can any one complaint or count be made to subserve the purposes of two or more distinct and dissimilar causes of action, at the option of the party presenting it. If counsel disagree as to the nature of the action or purposes of the pleading, it is the province of the courts to settle the dispute. It is a question, when properly raised, which cannot be left in doubt; and the court must determine with precision and certainty upon inspection of the pleading to what class of actions it belongs, or was intended to belong, whether of tort, upon contract, or in equity; and if necessary and material, even the exact kind of it within the class must also be determined.² This is not only in harmony with the decisions above referred to, but with all the decisions of this court bearing upon the question, and we know of none elsewhere in conflict. It is in harmony with these decisions which have been made, that an application to amend should be denied which professes to entirely change the cause of action sued upon, or to introduce a new one of a different kind."³ The nature of the reformed pleading and its essential principles are here stated in a most clear and accurate manner, while the description of the improper modes which prevail to such an extent in actual practice is equally graphic and correct. The one explains the intent

¹ *Howland v. Needham*, 10 Wisc. 495, 498.

² See *Clark v. Langworthy*, 12 Wisc. 441; *Gillett v. Treganza*, 18 Wisc. 472.

³ Citing *Newton v. Allis*, 12 Wisc. 378; *Sweet v. Mitchell*, 15 Wisc. 641, 664; 19 Wisc. 524; *Larkin v. Noonan*, 19 Wisc. 82; *Stevens v. Brooks*, 28 Wisc. 196. The opinion proceeds to show that the conclusion thus reached is in harmony with the decisions made in *Scheunert v. Kaehler*, 28 Wisc. 528; *Anderson v. Case*, 28 Wisc. 605; *Lee v. Simpson*, 29 Wisc. 333; *Ragan v. Simpson*, 27 Wisc. 355; *Samuels v. Blanchard*, 25 Wisc. 329. It also declares that in determining upon demurrer the true nature of the complaint, its object, and what particular kind or cause of action is stated in it, the character of the summons may be taken into consideration in connection with the form of the allegations in the complaint;

and this particular conclusion is also sustained by the recent decision made by the New York Court of Appeals, before cited. Having thus laid down the general principles, the learned judge applies them to the case before him. The summons is for relief, which indicates the pleader's intention to bring an action of tort, and not one on implied contract for money had and received. The complaint itself is pronounced insufficient in its averments; the charges of fraud and conversion are in the form of general legal inferences, without the necessary statements of facts. "A general charge that a party acted fraudulently, falsely, or wrongfully, or that he made fraudulent representations or statements, amounts to nothing; there must be a specification of facts to justify it" (p. 634). The foregoing quotations form a small part of this exceedingly instructive opinion.

and design of the reform; the other shows how that design has been ignored, and that intent frustrated.

§ 565. The new procedure, from its dread lest the proper requirements as to form should degenerate into mere technicalities, and from its opposition to the decision of controversies upon points not involving the merits, has made most ample and liberal provision for amendments. The sections of the codes are quoted at large in a former paragraph.¹ So far as they relate to the pleadings, amendments are separated into two general classes, — those made before the trial, and those made during or after the trial. The first of these classes is again subdivided into (1) the amendments of course, without any application to the court, which each party is allowed to make once in his own pleading within a specified time after it is filed or served; (2) the amendments which are made by permission of the court as the result of a special motion or application for that purpose, including those which the party is generally suffered to make in his pleading after a demurrer to it has been sustained. The amendments of the second class are for the purpose of conforming the pleadings to the facts which have been proved, or which are proposed to be proved, at the trial. They are all made by permission of the court, frequently upon an oral application during the trial or during the argument on appeal, often by the court itself on its own suggestion. Sometimes, however, the trial is suspended, and the party desiring an amendment is driven to a formal motion in order to obtain it.² It is not within the scope of this work to describe the practice in reference to amendments, nor to discuss the particular cases in which they have been or will be allowed. I shall simply state the general principles which have governed the courts in the exercise of the discretion conferred upon them by the statute.

§ 566. In giving a practical interpretation to the clauses of the codes, a conflict of decision has arisen among the tribunals of the different States, and sometimes among those of the same State, which it is utterly impossible to reconcile. The rule is established by one class of cases, and prevails in certain States, that in all the voluntary amendments which a party may make as a matter of course in his own pleadings, and in all

¹ See *supra*, § 485.

² This particular instance strictly belongs to the first general class, since it is virtually an amendment before the trial.

amendments before trial for which the party applies to the court by motion, including those rendered necessary by the sustaining of a demurrer to his pleading, he cannot under the form of an amendment change the nature and scope of his action; he cannot substitute a wholly different cause of action in place of the one which he attempted to set up in his original pleading.¹ A very different rule is laid down by another class of cases. It is settled in New York by a carefully considered decision of the Court of Appeals, which overrules a number of contrary decisions made by inferior tribunals of that State, that a complaint may be amended voluntarily and of course, by substituting an entirely different cause of action for the one originally alleged, provided the summons continues to be appropriate. It is not necessary that the new cause of action should be of the same general nature or class as the first one; but the plaintiff may, by omitting a cause of action, substitute another in its stead of an entirely different class and character, if the change does not require an alteration in the summons. A like rule it was held also applies to answers and to defences contained therein.² In some States this liberal interpretation of the code has been

¹ *Supervisors v. Decker*, 84 Wisc. 378; *Rutledge v. Vanmeter*, 8 Bush, 354, 356; *McGrath v. Balser*, 6 B. Mon. 141. In *Supervisors v. Decker*, a complaint had been served which was in tort, and which attempted to state a cause of action for the conversion of money and things in action. A demurrer had been sustained on the ground that the averments were insufficient, but permission to amend was given. An amended complaint was served which was exactly the same as the original, except that the allegations "and converted the same to his own use," and the like, were omitted. The summons for relief was unchanged. The questions arose on a motion by the defendant to take this amended complaint from the files. The court held that before trial the plaintiff cannot amend the complaint by changing the entire cause of action from one *ex delicto* to one *ex contractu*. The whole subject of amendment was exhaustively discussed; prior decisions of the Wisconsin court were adhered to, while the New York cases which sustain another doctrine were ex-

pressly disapproved. It should be noticed that the actual substantial cause of action was unchanged; the only variation was in the manner and form of its statement.

² *Brown v. Leigh*, 12 Abb. Pr. n. s. 198 (1872). See also, to the same effect, *Mason v. Whitely*, 1 Abb. Pr. 85; 4 Duer, 611; *Prindle v. Aldrich*, 18 How. Pr. 466; *Troy and B. R. R. v. Tibbits*, 11 How. Pr. 168; *Watson v. Rushmore*, 15 Abb. Pr. 51. Some of these cases apply the same doctrine to amendments made upon motion. By this rule, an entirely new defence may be added to an answer by an amendment of course. *McQueen v. Babcock*, 13 Abb. Pr. 268; 3 Keyes, 428; *Wyman v. Remond*, 18 How. Pr. 272. Although the Court of Appeals, in *Brown v. Leigh*, pointed out a difference between the terms of the section which permits amendments of course and of that which allows amendments upon application to the court before trial, yet it did not hold that the latter were to be any more restricted in their scope and extent than the former.

expressly extended to those amendments which require the consent of the court granted upon a motion, and the rule is settled that even in that class the cause of action or defence may be entirely changed.¹ In respect to the amendments made at the trial, or on appeal, or by the court upon its own motion, great freedom is used, provided the parties are not misled and surprised, and the issues to be decided are not wholly changed. When evidence has been received without objection making out a cause of action, and especially after a favorable verdict upon such evidence, the utmost liberality is shown by the courts in conforming the averments of the pleading to the case as proved, if the ends of justice will be subserved thereby.² The plaintiff cannot, however, have his summons and complaint amended during the trial by substituting a different defendant for the single one who was sued, and who had appeared and defended.³

§ 567. *Election between actions ex delicto and those ex contractu.* Intimately connected with the questions last discussed, as to the proper forms of actions and the correspondence between the allegations and the proofs, is the subject indicated by this heading; that is, the power held by the plaintiff, under certain circumstances, of choosing whether he will treat his cause of action as arising from tort or from contract. This right of election sometimes occurs when the contract is express, — but, on account of the tortious acts of the defendant, the plaintiff may disregard it, and sue directly for the wrong. In the great majority of instances, however, the contract invoked, and made the basis of the suit, is implied. The theory of the implied promise, and its invention in order that certain classes of liabilities might be enforced by means of the action of assumpsit, have been already explained. As the fictitious promise was implied or inferred by the law from

¹ This is particularly the case in North Carolina, where the greatest liberality of amendment prevails. *Robinson v. Willoughby*, 67 N. C. 84; *Bullard v. Johnson*, 65 N. C. 486. In the first case the action was brought to recover possession of land under a deed absolute on its face (ejectment). The court, on appeal, held that this deed was in fact a mortgage, and reversed a judgment obtained by the plaintiff, ordering a new trial. Before the second trial, an amendment was permitted changing the cause of action from

its original form to one for the foreclosure of this mortgage.

² *Supervisors v. Decker*, 34 Wisc. 378; *Hodge v. Sawyer*, 34 Wisc. 397; *Bowman v. Van Kuren*, 29 Wisc. 209, 215; *Smith v. Whitney*, 22 Wisc. 438; *Robinson v. Willoughby*, 67 N. C. 84; *Bullard v. Johnson*, 65 N. C. 486; *Oates v. Kendall*, 67 N. C. 241.

³ *Little v. Virginia, &c. Water Co.*, 9 Nev. 317. The reporter's headnote is much broader than the decision actually made, and is manifestly erroneous.

acts or omissions of the defendant which created a liability *ex æquo et bono*, it sometimes happened that these acts or omissions were tortious in their nature. In such a case, therefore, the liability could be regarded in a double aspect; namely, as directly springing from the tort committed by the wrong-doer, or as arising from the promise to make compensation which the law implied and imputed to him. As the single liability thus resulting from the given acts or omissions was considered under these two different aspects, the common law provided two distinct means or instruments for enforcing it, — one by the form of action appropriate for the recovery of damages from the tort, the other by the form of action appropriate for the recovery of damages from the breach of an implied promise. In what instances — that is, in what classes of tortious acts or omissions — the right of action existed had been determined by the courts, although there was not a complete uniformity of decision among the tribunals of the several States.

§ 568. The doctrine of electing between an action *ex delicto* and one *ex contractu*, or, to speak more accurately, between treating the cause of action as arising from tort or from contract, has been retained under the new procedure; and it is applied in the same classes of cases, and is governed by the same general rules, as in the former system. The courts, without, perhaps, appreciating the full extent of the changes, and the effect of abolishing all distinctions between forms of actions, decided that the power of choice between the two modes of enforcing demands, of waiving the tort and suing upon an implied promise, still exists; and these early decisions have been followed by so many others without an expression of dissent, that the rule is as firmly established in the reformed as it was in the common-law pleading. The single principle upon which the entire doctrine rests is very simple, and should — and would, if the courts were always consistent in acting upon it — afford a ready and plain solution of every question, new or old, which can be suggested. This single principle may be thus formulated: From certain acts or omissions of a party creating a liability to make compensation in damages, the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once

follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults ; or may treat it as arising from an implied contract, and enforce it by an action setting forth the facts from which the promise is inferred by the law. It should be remembered that different promises may be inferred from different acts or omissions : thus, in one case, the promise might be to pay over money had and received to the use of the injured party ; and in another, where no money had been actually received, the implied undertaking might be that the wrong-doer would pay the value or price of goods taken by him. This distinction, so palpable and commonplace, seems to have been overlooked in some classes of decisions.

§ 569. Having thus formulated the general principle which prevailed in the former procedure, and which has been adopted to its full extent in the present, I shall, in its further illustration, state the various classes of cases to which it has been applied by the courts, and shall thus ascertain the particular instances—the kinds of wrongful acts and omissions—in which the right of election exists. To this will be added a few observations upon the mode of indicating the fact that an election has been made by the pleader, that a tort has been waived, and a cause of action upon contract has been chosen. The most common classes of tortious acts, in respect of which the right of election has been invoked, are the wrongful taking, or conversion of chattels, or things in action, or money ; the wrongful use of lands, and appropriation of its rents and profits ; sales of goods on a credit procured by the fraud of the purchaser ; frauds and deceits generally by which money or things in action, or chattels, are obtained ; and certain cases of express contract, in which, from the policy of the law, the liability is regarded as resulting from a violation of general duty as well as from a breach of the stipulations of the agreement. These classes will be considered separately. It is a firmly established rule, from which no dissent has been suggested, that when goods or things in action have under any circumstances been wrongfully taken or detained or converted, and have been *sold* or disposed of by the wrong-doer, the owner may sue in tort to recover damages for the taking and carrying away or the conversion, or he may waive the tort and

sue on the implied promise to refund the price or value as money had and received to the plaintiff's use.¹ When, however, the chattels or things in action have been simply taken or converted, but not sold or disposed of by the wrong-doer, a conflict of opinion exists in respect to the power of the plaintiff to elect between the two forms of action. Certain cases deny this power. This ruling is rested upon the ground that the goods remaining in the hands of the wrong-doer, and no money having in fact been received by him, an implied promise to pay over money had and received by the defendant to the plaintiff's use does not and cannot arise.² In this country, however, the weight of authority is strongly the other way. The cases generally admit an election under the circumstances described, between an action based upon the tort, and an action based upon the implied promise to pay the price or value of the goods. The tort is waived, and the transaction is treated as a sale, and not as an instance of money had and received. This distinction is certainly supported by the plainest principles, if the doctrine of implied promises and election is to be admitted at all.³ If money has been converted, the

¹ *McKnight v. Dunlop*, 4 Barb. 36, 42; *Hinds v. Tweddle*, 7 How. Pr. 278, 281; *Harpending v. Shoemaker*, 37 Barb. 270, 291; *Chambers v. Lewis*, 2 Hilt. 591; *Leach v. Leach*, 2 N. Y. S. C. 657; *Tryon v. Baker*, 7 Lans. 511, 514; *Roberts v. Evans*, 43 Cal. 880; *Gordon v. Bruner*, 49 Mo. 570, 571; *Putnam v. Wise*, 1 Hill, 234, 240, and the reporter's note; *Berly v. Taylor*, 5 Hill, 577, 584, and the reporter's note.

² *McKnight v. Dunlop*, 4 Barb. 36, 42; *Henry v. Marvin*, 8 E. D. Smith, 71; *Tryon v. Baker*, 7 Lans. 511, 514.

³ *Hinds v. Tweddle*, 7 How. Pr. 278, 281; *Chambers v. Lewis*, 2 Hilt. 591; *Putnam v. Wise*, 1 Hill, 234, 240 (and see note of the reporter); *Berly v. Taylor*, 5 Hill, 577, 584 (and note of the reporter); *Roberts v. Evans*, 43 Cal. 880; *Gordon v. Bruner*, 49 Mo. 570, 571. In the last case, goods had been carried away and converted by the defendant. The court, by Bliss J., said: "It is not disputed, that when there is a conversion of personal property, and that property has been sold and converted into money, the owner may ratify the sale by suing the wrong-doer

as for money had and received to his use: but when the property has not been sold, but still remains in the hands of the wrong-doer, there is a difference of opinion; and there have been conflicting decisions whether the owner may waive the tort, and sue for goods sold and delivered. In Massachusetts, in *Jones v. Hoar*, 5 Pick. 285, to which there is a note to a former opinion reviewing the English cases, it was held that no contract could be implied unless the goods were sold and converted into money; and the same doctrine was held in Pennsylvania, in *Willett v. Willett*, 8 Watts, 277, and in *Morrison v. Rogers*, 2 Ill. 817. But such has not been the uniform ruling. In *Putnam v. Wise*, 1 Hill, 240, the court holds that, "according to the well-known right of election in such cases, the plaintiff might have brought 'assumpsit' as for goods sold and delivered against those who had tortiously taken their property." To this the reporter, Mr. Hill, adds a note, reviewing the cases, and disapproving the doctrine of *Jones v. Hoar*. (See *Hill v. Davis*, 3 N. H. 384; *Stockett v. Watkins's Administrator*, 2

right of election exists under the operation of either rule, since the actual receipt of money by the defendant brings the case exactly within the reason and operation of the doctrine as first stated.¹ The same choice between the actions may sometimes be possible when the liability is connected with a claim to land or grows out of its use, although the instances are much fewer than those of the preceding class. Thus, when the owner agreed to lease certain premises to the plaintiff for a term of years commencing at a future day named, but before that day actually leased them to another person who took possession, and when the time arrived the plaintiff demanded possession, tendered the rent, and on refusal brought an action for damages, it was objected on the trial that his only remedy was ejectment against the tenant in possession. The court held, that, while the plaintiff might have maintained ejectment, he could also bring an action against the lessor, which could be either upon the agreement express or implied, or in tort for the violation of the duty arising from the relation of lessor and lessee between the parties.² It is settled in Wisconsin, after a careful consideration and an exhaustive analysis and comparison of the conflicting decisions, that when the defendant had committed a wilful trespass upon the plaintiff's land by deliberately turning his cattle thereon, in order that they might feed upon the grass, the plaintiff might waive the tort, and sue upon an implied contract for the price and value of the pasturage.³

Gill & J. 326, and cases cited.) Quoting early Missouri decisions to the same effect, — *Floyd v. Wiley*, 1 Mo. 480, 648; *Johnson v. Strader*, 3 Mo. 359, — the learned judge adds: "It may be treated, then, as the doctrine in this State, that one who has converted to his own use the personal property of another, when sued for the value of that property as sold to him, will not be permitted to say in defence that he obtained it wrongfully."

¹ *Tryon v. Baker*, 7 Lans. 511, 514.

² *Trull v. Granger*, 8 N. Y. 115. On the other hand, when a complaint alleged that the plaintiff was the owner and entitled to the possession of certain premises, that the defendant took possession thereof under a void deed, and leased them, and has received the rent arising from

such letting, and demanded judgment for the amount so received, the court held that there was no power to waive the tort, and sue on contract for money had and received; that the doctrine of election did not extend so far as to allow the plaintiff to try, under the form of an action for money had and received, a right or claim to real estate, or to its possession, or to its rents and profits. *Carpenter v. Stilwell*, 8 Abb. Pr. 459. This was a Special Term decision, and does not, therefore, have much authority as a precedent.

³ *Norden v. Jones*, 33 Wisc. 600, 604, 605. The opinion of Dixon C. J. is a full and most instructive examination of the doctrine. It rejects the narrow rule which confines an election to the single case

§ 570. It is a familiar rule, that the action against a common carrier for a loss or injury of goods may either be in tort for the violation of his general duty, or on the contract which he expressly or impliedly enters into. The owner has his election which of these remedies he will pursue; but his choice cannot alter the extent of the carrier's liability.¹ Fraud in its various phases also furnishes many occasions and opportunities for the exercise of an election between actions. One of the most common is the case of a sale upon a credit procured by the false and fraudulent representations of the vendee as to his pecuniary responsibility. Upon discovering the fraud, even before the expiration of the credit, the vendor may rescind the sale, and immediately bring an action in form of tort either to recover the goods themselves, or damages for their taking and conversion; or he may waive the tort, and sue at once on contract for the price.² And when money has been obtained by false and fraudulent representations, or by fraudulent practices of any kind, the plaintiff has the option to sue either in tort for the deceit, or in contract for money had and received by the defendant to his use.³

where the wrong-doer has actually received money, and accepts the broad principle that the election may be had whenever a promise is implied.

¹ *Campbell v. Perkins*, 8 N. Y. 430, 438; *Brown v. Treat*, 1 Hill, 225; *People v. Kendall*, 25 Wend. 399; *Wallace v. Morris*, 5 Hill, 391; *Campbell v. Stakes*, 2 Wend. 137.

² *Roth v. Palmer*, 27 Barb. 652, and cases cited; *Kayser v. Sichel*, 34 Barb. 84; s. c. on app. *sub nom.* *Wigand v. Sichel*, 3 Keyes, 120, approving *Roth v. Palmer*.

³ *Byxhie v. Wood*, 24 N. Y. 607, 610; *Union Bank v. Mott*, 27 N. Y. 638, 636. In the first of these cases, objection was taken that the cause of action was for a tort,—deceit. The court, after stating the facts as found on the trial, which placed the recovery upon the defendant's implied contract to refund money which he had obtained by fraudulent practices, proceed as follows: "This state of facts does not necessarily require an action to be brought for the tort. Such facts always raise in law the implied promise

which was the contract-cause of action in *indebitatus assumpsit* for money had and received. Having money that rightfully belongs to another creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise, and the action always sounds in contract." On the other hand, in *Union Bank v. Mott*, where two defendants had, through fraudulent collusion with its officers, overdrawn a large sum of money from the bank, and insisted that the action brought against them was necessarily on contract, and was therefore joint, and could not be revived against the executors of one of them who had died, the court said, per S. L. Selden J.: "The plaintiff's counsel, however, insists—and, I think, correctly—that the basis of the action is tort, and not contract express or implied; that its object is not to recover for money had and received by the defendants to plaintiff's use, thus waiving the tort, but to obtain a judgment for the damages which the plaintiff has sustained through the fraudulent conduct of the defendants." The liability was therefore declared to be

§ 571. The conflict which has existed to a certain extent among the decisions in reference to the right of election, and the classes of tortious acts and omissions embraced within it, can only be put to rest by determining with certainty the occasions and circumstances in which a promise will be implied by the law. It is very clear that whenever the promise will be implied, if the acts or omissions from which it is inferred are at the same time tortious, the election to sue for the tort or for a breach of the contract must necessarily exist, or else it must be denied on some mere arbitrary and insufficient ground. The whole discussion is thus reduced to the single question, When is a promise implied by the law? The comprehensive principle which furnishes a definite answer to this inquiry, applicable to all circumstances and relations, has been well stated by the courts in the following terms: "When a promise is implied, it is because the party intended it should be, or because natural justice plainly requires it in consideration of some benefit received."¹ It was also said by a very able English judge, that "no party is bound to sue in tort, when by converting the action into an action on contract he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in con-

several. It will be noticed that these two cases were alike in all their essential facts, and that, in one of them, the tort was held to have been waived, and in the other not to have been waived; and this distinction was, in fact, made, not upon any difference in the allegations, but because it subserved the ends of justice, and defeated an objection of mere form. A peculiar instance of fraud was presented in the recent case of *Booth v. Farmers' and Mech. Bank*, 1 N. Y. S. C. 45, 49. The complaint contained two distinct causes of action. The first alleged, that, in 1860, the defendant recovered a judgment for \$3,500 against a certain person named, which was properly docketed; that, in 1861, the defendant, for a valuable consideration, assigned said judgment to the plaintiff; that, after the docketing of said judgment, the debtor owned land in the county where it was docketed more than sufficient in value to have satisfied it, and upon which it was a lien; that, in 1864, the defendant, without au-

thority, discharged said judgment, whereby the lien of the judgment was lost, and the debtor was able and did convey the said land to *bona fide* purchasers; that the judgment debtor is now insolvent; wherefore the plaintiff has lost said judgment, which otherwise might and would have been collected, and has sustained damage to the amount of \$3,500. The second cause of action was for money had and received. In answer to a demurrer on the ground that causes of action had been improperly united, the plaintiff claimed that he had waived the tort in the first count, and had sued on an implied contract. The court, while conceding that the tort might be waived, and the right of action be placed upon the implied promise, held that there had, in fact, been no such waiver, but that the first count was in tort. See the opinion of Mullin J., given in full, *supra*, § 539.

¹ *Webster v. Drinkwater*, 5 Greenl. 322; also per Beardsley J. in *Osborn v. Bell*, 5 Denio, 370.

tract.”¹ If these quotations are correct statements of the general principle it is plain that the rule maintained by some decisions, which would restrict the right of election to those cases in which the wrong-doer has actually received money equitably belonging to the plaintiff, is erroneous.²

§ 572. The foregoing examples sufficiently illustrate the scope and extent of the doctrine under consideration, and the class of liabilities to which it is applied. It remains to inquire how, under the new procedure, the plaintiff shall indicate in his pleading the fact that he has actually made his election, and has brought his action in tort or on contract, as the case may be. Under the old system, no such question could arise. The election was disclosed by the form of the action itself. If the liability was to be treated as arising from contract, assumpsit was of course the action selected; if from tort, trover or case or replevin, or sometimes trespass, were the proper instruments. Since these forms have been abolished, and all the technical phrases which distinguished one proceeding from another are abandoned, it is only by the substantial nature and contents of the allegations themselves — the facts which they aver — that the election can, if at all, be now indicated. In other words, as the pleader can express his design by means of no arbitrary symbols in the complaint or petition, he must show that he has chosen to sue either in tort or on contract by the very substance of the averments which constitute the cause of action. In a recent case the New York Supreme Court proposed a certain test, and declared that when the plaintiff claims to have waived the tort, and to have sued upon an implied contract, the only possible mode of showing this election is by expressly alleging a promise to have been made by the defendant; that in no other manner can the design of making the action one *ex contractu*, and of distinguishing it from one *ex delicto*, be disclosed on the face of

¹ *Young v. Marshall*, 8 Bing. 48, per Tindal C. J.

² It was said by Hogeboom J., while commenting upon this narrow rule in *Roth v. Palmer*, 27 Barb. 652: “Our courts recognize no such distinction. They allow the election in all cases where the plaintiff would have been allowed to pursue his remedy in tort.” See

also the following cases: *Centre Turnpike Co. v. Smith*, 12 Vt. 217; *Cummings v. Vorce*, 8 Hill, 282; *Osborn v. Bell*, 5 Denio, 370; *Camp v. Pulver*, 5 Barb. 91; *Butts v. Collins*, 18 Wend. 139, 154; *Lightly v. Clouston*, 1 Taunt. 118; *Hill v. Perrott*, 3 Taunt. 274; *Young v. Marshall*, 8 Bing. 48.

the pleading.¹ It has already been shown that this conclusion is directly opposed to the fundamental principles of the reformed pleading, and that it is a return to the most technical and purely fictitious dogmas and distinctions of the common-law system. It is also opposed to decisions and judicial dicta in relation to this very question which declare that such a mode of stating the cause of action is inadmissible, and that the facts alone which constitute it must be averred as they actually took place.²

§ 573. Whenever the contract relied upon is express, there can be no difficulty in showing the election upon the face of the pleading. If the plaintiff chooses to bring an action *ex contractu*, his complaint or petition will simply state the terms of the agreement, and the facts which constitute the breach thereof. If he chooses to bring an action *ex delicto* for a violation by the defendant of his general duty, his complaint or petition will set out the facts showing his own primary right and the defendant's duty, disregarding the contract, and will then allege the tortious acts or omissions by which that right and duty were violated. Although the same actual transaction between the parties would be stated in either case, the form and manner of the statement would be entirely and plainly different. An ordinary claim against a common carrier for the loss of goods furnishes a familiar example of these two modes. But when the contract relied upon is implied, and is simply the fictitious promise which the law infers from the tortious acts themselves, it may be doubted whether it is possible, in accordance with the true principles of the reformed

¹ Booth v. Farmers' and Mech. Bank, 1 N. Y. S. C. 45, 49. See the complaint given *supra* in note to § 570, and the opinion of Mullin J., *supra*, § 589.

² Byxbie v. Wood, 24 N. Y. 607, 610; Chambers v. Lewis, 2 Hilt. 591. The facts of Byxbie v. Wood were stated, and an extract from the opinion was given in the note to § 270. Immediately following the language there quoted, the learned judge proceeds as follows: "Under the code, this implied promise is treated as a fiction, and the facts out of which the prior law raised the promise are to be stated without any designation of a form of action; and the law gives such judgment as, being asked for, is appropriate to the facts. Of course we cannot now say that a particular

phrase makes a particular form of action, so that a party, by its use, may shut himself out from the remedy which his facts would give him." As the court were here discussing the doctrine of election, and as they held that the complaint stated a cause of action on contract, and not one in tort, *although no promise was alleged*, this language, and the decision upon it, are entirely inconsistent with the position taken, and the test suggested by the Supreme Court in Booth v. Farmers' and Mech. Bank. In Chambers v. Lewis, the court simply said that whether a waiver has been made must now be shown by the facts averred in the complaint and by the prayer.

pleading, to frame a complaint or petition in all cases which shall show on its face that the plaintiff has elected to bring his action, either in tort or on contract. In one class of liabilities it is certainly possible to do so; namely, in those which result from the defendant's fraudulent representations and deceits. The allegation of a *scienter* is indispensable in the action *ex delicto* based upon such a liability, and distinguishes it in a marked manner from the correlative action based upon the implied promise. But when the liability results from the wrongful taking or conversion of chattels, from trespasses, negligences, or other similar kinds of wrongs, the very facts which are alleged in the action of tort are the facts from which the promise is inferred; and, according to the true theory of pleading, these facts must also be stated in the action *ex contractu*, without any legal inferences or conclusions. It conclusively follows, that, in this general class of liabilities, as the facts which constitute the cause of action are the same in each, the averments of the complaint or petition must be the same in each kind of action, if the essential principles of the reformed system are complied with, so that it is impossible to indicate upon the face of the pleading alone the election which the plaintiff has made. The form of summons adopted would therefore seem to be the only certain test, in this class of cases, by which the nature of the action can be determined, and the fact of an election can be made known to the adverse party. The only other alternative is, to insert in the complaint certain legal conclusions or descriptive phrases which, in reference to the statement of the cause of action, are purely immaterial and redundant.

SECTION FOURTH.

THE FORM OF THE COMPLAINT OR PETITION.

§ 574. Having thus discussed and determined the fundamental principles and general doctrines of the reformed pleading, which apply to all causes of action, and to all defences by way of confession and avoidance or of affirmative relief, I shall now briefly consider the rules which pertain to the form of the complaint or petition, and which regulate the manner of stating and arranging its allegations. These rules are few and simple; and their

object is to render the issues single and certain, and to present the cause of action for a decision upon its merits, and not upon any technical, incidental, or collateral questions. In one important feature the new system stands in marked contrast with the old, — the entire absence of all special phrases or formulas by which the kinds of actions are distinguished, or by which the pleadings or any parts of them are characterized.

§ 575. When a complaint or petition contains two or more causes of action, all the codes require that they shall be distinctly and separately stated and numbered; and the method by which a violation of this requirement is to be corrected has already been explained.¹ It is a settled rule, that, if the pleading is of this kind, each separate division or count must be complete by itself, and must contain all the averments necessary to a perfect cause of action. Defects and omissions in one cannot be supplied by the allegations found in another; nor can the pleader, by merely referring to material facts properly set forth in a former count, incorporate them into and make them part of a subsequent one. In other words, all the issuable or material facts constituting the ground for a recovery must be stated in each cause of action, even though some repetition might thereby become necessary. This requirement, however, applies only to the material and issuable facts which constitute the cause of action. Matter which is simply introductory or by way of inducement, and not part of the *gravamen*, after having been once set out at the commencement of the pleading, need not be repeated in each paragraph, but should be referred to merely. And this introductory matter includes all descriptions of the character, capacity, or particular right in respect of which the plaintiffs and defendants are made parties to the action, as executors, trustees, public officers, and the like. These and similar statements properly form the commencement or introduction of the complaint, distinct from the several causes of action, and equally applicable to all of them. Whenever, therefore, a cause of action is attacked by a demurrer directed either against it alone or against the entire pleading, it must stand or fall by its own averments, and cannot be helped out by any facts, however sufficient in themselves alleged in another paragraph or count.² But the par-

¹ See *supra*, §§ 447, 450.

555; *Durkee v. City Bank*, 18 Wisc. 216.

² *Abendroth v. Boardley*, 27 Wisc. 222; *Curtis v. Moore*, 15 Wisc. 184;

ticular sum of damages claimed in each cause of action need not necessarily be given at its close; it is sufficient if the aggregate amount is alleged and demanded at the end of the complaint.¹

§ 576. Since the reformed pleading requires the facts to be averred as they actually took place, it does not in general permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled, that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands; and when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial or by an application and direction at the trial, to select one of these counts, and to abandon the others. It is certain that different causes of action in the complaint or petition must, as a general rule, imply as many distinct causes of action actually held or claimed to be held by the plaintiff.² It cannot be said, however, that this rule is absolutely inflexible. As it is one of convenience simply, it must sometimes yield to the demands of justice and equity. Under peculiar circumstances, when the exact legal nature of the plaintiff's right and of the defendant's liability depends upon facts in the sole possession of the defendant, and which will not be developed until the trial, the plaintiff may set forth the same single cause of action in varied counts and with differing averments, so as to meet the possible proofs which will for the first time fully appear on the trial. This proposition is plainly just and right, and is sustained by the authority of able courts.³

Sabin v. Austin, 19 Wisc. 421, 423; *Catlin v. Pedrick*, 17 Wisc. 88, 91; *Barlow v. Burns*, 40 Cal. 351, 353; *Potter v. Earnest*, 45 Ind. 416; *Mason v. Weston*, 29 Ind. 561; *Day v. Vallette*, 25 Ind. 42; *Leabo v. Detrick*, 18 Ind. 414; *National Bank v. Green*, 33 Iowa, 140 (answer); *Silvers v. Junction R. R.*, 43 Ind. 485, 446 (reply).

¹ *Spears v. Ward*, 48 Ind. 541.

² *Sturges v. Burton*, 8 Ohio St. 215; *Muzzy v. Ledlie*, 23 Wisc. 445; *Lackey v. Vanderbilt*, 10 How. Pr. 155; *Nash v. McCauley*, 9 Abb. Pr. 159; *Sipperly v. Troy and B. R. R.*, 9 How. Pr. 83; *Hillman v. Hillman*, 14 How. Pr. 456;

Churchill v. Churchill, 9 How. Pr. 552; *Ford v. Mattice*, 14 How. Pr. 91; *Dunning v. Thomas*, 11 How. Pr. 281.

³ *Whitney v. Chicago, &c. N. W. R. R.*, 27 Wisc. 327, 340-342. The plaintiff had shipped wool on defendant's road for Chicago, and it was never delivered. He did not know whether it had been lost in the transit, or had been burned at a fire which had consumed defendant's warehouse in Chicago. He therefore set forth in his complaint two distinct causes of action — (1) against the defendant as a common carrier, and (2) against defendant as a warehouse-man — for the negligent loss of the goods. This manner of

§ 577. When a complaint or petition contains two or more distinct causes of action, a demurrer to it as a whole, or to all or some of the causes of action jointly, must fail and be overruled if any one of the separate causes of action included in the demurrer is good; and the same rule applies to separate defences in an answer.¹ The defendant should never demur to an entire complaint or petition consisting of several distinct causes of action, nor to two or more causes of action jointly, unless he is certain that they are all insufficient; and, under all circumstances, it is the better and safer practice to demur in express terms to each separately, for each will then stand or fall upon its own merits.² The same rule also applies to a demurrer for want of sufficient facts by two or more defendants jointly; it will be overruled as to all who unite in it if the complaint or petition states a good cause of action against even one of them.³ A different rule, however, prevails in some States.⁴

§ 578. It is expressly provided in all the codes, that material allegations of the complaint or petition not controverted by the answer are admitted, and they need not be proved; the same is of course true of averments expressly admitted. A denial of the legal conclusion, such as the indebtedness, while the answer is silent with respect to the issuable facts from which the conclusion follows, is a mere nullity, and raises no issue.⁵ What aver-

pleading was held proper under the circumstances, and the plaintiff could not be compelled to elect on the trial. The subject is exhaustively discussed by Dixon C. J., pp. 840-842. See also *Smith v. Douglass*, 15 Abb. Pr. 286; *Jones v. Palmer*, 1 Abb. Pr. 442.

¹ *Curtis v. Moore*, 15 Wisc. 184; *Jeffersonville, &c. R. R. v. Vancant*, 40 Ind. 283; *Heavenridge v. Mondy*, 34 Ind. 28; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, 630; *Ward v. Guyer*, 3 N. Y. S. C. 58; *Silvers v. Junction R. R.*, 43 Ind. 425, 442-445. In the last case the question arose on a reply which contained several paragraphs or defences. The defendant demurred as follows: "Now comes the defendant, and demurs to the second, third, and fourth paragraphs of the plaintiff's reply, upon the following grounds: *First*, said second paragraph does not state facts sufficient, &c.; *second*, said third paragraph does not state facts, &c.; *third*, said fourth paragraph does not," &c. This

demurrer was held to be joint, and not several; and the rule of the text was enforced. The opinion carefully discusses the question, what language makes a demurrer or an answer joint, and what several, citing on this topic *Lane v. State*, 7 Ind. 426; *Barner v. Morehead*, 22 Ind. 254; *Jewett v. Honey Creek Draining Co.*, 39 Ind. 245; *Parker v. Thomas*, 19 Ind. 218; *Fankboner v. Fankboner*, 20 Ind. 62; *Aiken v. Bruen*, 21 Ind. 137; *Hume v. Dessar*, 29 Ind. 112.

² *Durkee v. City Bank*, 13 Wisc. 216, 222.

³ *McGonigal v. Colter*, 32 Wisc. 614; *Webster v. Tibbits*, 19 Wisc. 438; *Shore v. Taylor*, 46 Ind. 845; *Owen v. Cooper*, 46 Ind. 524.

⁴ *Wood v. Olney*, 7 Nev. 109. The demurrer was sustained as to some, and overruled as to the others.

⁵ *Skinner v. Clute*, 9 Nev. 342; *Jenkins v. N. C. Ore Dressing Co.*, 65 N. C. 563.

ments are material, and are thus admitted unless controverted, is a question of law to be decided by the court, and not by the jury.¹ The result just mentioned does not arise from a failure to deny immaterial allegations; such statements are not issuable, and their truth is not conceded for the purposes of the trial by the defendant's neglect to controvert them. In this class are included all species of immaterial and non-issuable matter, such as details of evidence, conclusions of law, and averments of time, place, value, amount, and the like, in all ordinary circumstances.² An important question presents itself in this connection as to the effect of a qualified admission contained in the defendant's answer, and the decisions in respect to it are somewhat conflicting. The rule is settled by one group of cases, that when the answer expressly admits certain material averments of the complaint or petition, but at the same time accompanies this concession with the statement of affirmative matter in explanation and qualification by the way of defence, the plaintiff may avail himself of the admissions without the qualifications; he is not bound to take the defendant's entire statement; he is freed from the necessity of proving his own averments that are admitted, while the defendant must prove those which he sets up.³ Other cases seem to lay down a different rule, denying to the plaintiff the full benefit of the admission, and requiring him to accept it, if at all, with the defendant's qualifying matter.⁴ When different

¹ *Becker v. Crow*, 7 Bush, 198.

² *Doyle v. Franklin*, 48 Cal. 537, 539; *Gates v. Salmon*, 46 Cal. 861, 879 (evidence); *Chicago, &c. R. R. v. North West. U. P. Co.*, 38 Iowa, 377, 382 (value of goods); *People v. Commissioners*, 54 N. Y. 276, 279 (conclusion of law). See also *Sands v. St. John*, 36 Barb. 628; 23 How. Pr. 140; *Fry v. Bennett*, 5 Sandf. 54; *Newman v. Otto*, 4 Sandf. 668; *Oechs v. Cook*, 3 Duer, 161; *Harlow v. Hamilton*, 6 How. Pr. 475; *Connors v. Meir*, 2 E. D. Smith, 814; *Mayor, &c. v. Cunliff*, 2 N. Y. 165, 171.

³ *Dickson v. Cole*, 34 Wisc. 621, 626, 627. The answer admitted the agreement set forth in the complaint, but set up in connection therewith a further agreement by way of avoidance. On the trial, the court held the cause of action to be admitted, and the plaintiff was not called upon for any proofs. The defendant

urged, that, if the answer was taken as an admission at all in the plaintiff's favor, the whole of it should be taken. The court, by Lyon J., said: "In several cases this court has taken a different view of the law, and has held, that, if a fact be expressly admitted in any part of the answer, such fact is to be taken as true against the defendant, and the plaintiff is relieved from the necessity of proving it, and this though it may be controverted in some other part of the answer. The principle must necessarily be the same when the fact is stated by way of confession and avoidance, as in this case." The following cases were cited as sustaining this view: *Sexton v. Rhames*, 13 Wisc. 99; *Hartwell v. Page*, 14 Wisc. 49; *Orton v. Noonan*, 19 Wisc. 850; *Farrell v. Hennessy*, 21 Wisc. 682.

⁴ *Troy and Rut. R. R. v. Kerr*, 17 Barb. 581. As to the effect of admis-

defendants have put in separate answers, an admission by one cannot be used against the others:¹ and the same doctrine extends to separate defences of one party in a single answer; the admissions in a defence of confession and avoidance do not overcome the effect of a denial contained in another.²

§ 579. A defective complaint or petition may be supplemented, and substantial issues may thus be presented by the answer itself. When the plaintiff has failed to state material facts, so that no cause of action is set forth, but these very facts are supplied by the averments of the answer, the omission is immaterial, and the defect is cured. This rule should properly be confined to the case where the answer affirmatively alleges the very fact that is missing from the complaint; but it has in some instances been enforced, although the answer simply contained a denial of the necessary fact which should have been averred by the plaintiff.³ A statement in the reply, however, of a fact which ought to have been alleged in the complaint or petition, is not sufficient, and does not cure the defect.⁴

§ 580. The prayer for relief is generally regarded as forming no part of the cause of action, and as having no effect upon it, and as furnishing no test or criterion by which its nature may be determined.⁵ This prevailing view was well expressed by a recent decision of the New York Court of Appeals in language which I quote: "The relief demanded by no means characterizes the action, or limits the plaintiff in respect to the remedy which he may have. If there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his com-

sions, see also *Simmons v. Law*, 8 Bosw. 218; 3 *Keyes*, 217; *Paige v. Willett*, 88 N. Y. 81; *Tell v. Beyer*, 88 N. Y. 161; *Robbins v. Codman*, 4 E. D. Smith, 825.

¹ *Swift v. Kingsley*, 24 Barb. 541; *Troy and Rut. R. R. v. Kerr*, 17 Barb. 581, 599.

² *Vassear v. Livingston*, 18 N. Y. 256; 4 *Duer*, 285; *Ayres v. Covill*, 18 Barb. 264; 9 *How. Pr.* 578. See this topic treated at large *infra* in ch. 4, sect. 4.

³ *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 357; *Miller v. White*, 6 N. Y. S. C. 256; *Garrett v. Trotter*, 65 N. C. 480, 482; *Bate v. Graham*, 11 N. Y. 287; *Louisville, &c. Canal Co. v. Murphy*, 9 Bush, 522, 529 (a simple denial in the

answer); but see *Scofield v. Whitelegge*, 49 N. Y. 259, 261, which expressly holds that a denial merely in the answer is not sufficient; *Shartle v. Minneapolis*, 17 Minn. 308, 312.

⁴ *Webb v. Bidwell*, 15 Minn. 479, 485.

⁵ *Goodall v. Mopley*, 45 Ind. 355, 359; *Lowry v. Dutton*, 28 Ind. 478; *Bennett v. Preston*, 17 Ind. 291; *Cincinnati, &c. R. R. v. Washburn*, 25 Ind. 259; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, 631. This doctrine cannot, of course, be true in the one or two States whose codes provide for a demurrer when the facts alleged show that the plaintiff is not entitled to the relief demanded in his petition or complaint.

plaint. But the fact, that after the allegation of the facts relied upon the plaintiff has demanded judgment for a sum of money by way of damages, does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief. The relief in the two cases would be precisely the same; the difference would be formal and technical. If every fact necessary to the action is stated, the plaintiff may even, when no answer is put in, have any relief to which the facts entitle him consistent with that demanded in the complaint."¹ Although this theory has been accepted by most of the courts, and is approved in numberless cases, at least one tribunal of high character has suggested that the prayer for relief may be properly appealed to as the test by which the nature of the action can be determined in all cases where the pleader has, by his mode of alleging the facts, left his intention in doubt.² I have thus discussed and stated those fundamental principles and general doctrines of the reformed pleading which are common to all causes of action. The more special rules which prescribe the manner and form of averring particular facts, and which determine the mode of alleging the various causes of action considered separately and individually, must be omitted from the present volume. They will find their appropriate place in the second part of the work, which will treat of the different remedies themselves that may be obtained by means of the civil action.

¹ *Bradley v. Aldrich*, 40 N. Y. 504; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, 631, per Allen J.

² *Gillett v. Treganza*, 13 Wisc. 472, 475, per Dixon C. J.: "Under our present system, the test by which we are to determine the character of actions in those cases where the facts stated indicate two

or more actions must be the relief demanded. We may, at least, safely adopt this rule in cases of doubt, and in cases like the present, where the pleader, conceiving himself entitled to prosecute several actions, has so stated his facts as to leave it uncertain which he intended to pursue."

CHAPTER FOURTH.

THE DEFENSIVE SUBJECT-MATTER OF THE ACTION ; THE
FORMAL PRESENTATION OF HIS DEFENCE, OR OF HIS
CLAIM FOR AFFIRMATIVE RELIEF, BY THE DEFENDANT.

SECTION FIRST.

STATUTORY PROVISIONS CONCERNING MATTERS OF DEFENCE.

§ 581. I COLLECT together in one group all the sections of the various codes relating to the nature and contents of the answer, including denials, new matter, counterclaims, set-offs, affirmative relief, and cross-complaints. The clause defining the answer, and describing its contents, is substantially the same, with some unimportant variations, in all the codes ; the principal, and indeed only, material differences are found in the provisions relating to counterclaims and cross-demands generally. The following are the sections which determine generally the nature of the answer as a pleading. "The answer of the defendant must contain, 1. A general or specific denial of each material allegation of the complaint [or petition] controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; 2. A statement of any new matter constituting a defence or counterclaim [or set-off] in ordinary and concise language, without repetition."¹ In a few States the foregoing description is employed, with slight verbal changes, and to it is added another subdivision. The sections, as found in these codes, are given at large in the foot-note.²

¹ New York, § 149 ; Wisconsin, ch. 125, § 10 ; Ohio, § 92, except, in subd. 1, the clause "or any knowledge," &c., is omitted, and, in subd. 2, "or set-off" is inserted ; Missouri, art. 5, § 12, except, in subd. 1, the words "general or" are omitted, so that it reads, "1. A special denial," &c. ; Nebraska, § 99, with same modifications as in Ohio ; Indiana, § 56, except that, in subd. 1, "general or spe-

cific" and "material" are omitted, so that it reads, "1. A denial of each allegation," &c., and "or set-off" is inserted in subd. 2 ; Florida, § 100 ; Oregon, § 71, as in the text, except the words "general or" are omitted in subd. 1, which reads, "A specific denial of," &c. ; North Carolina, § 100 ; South Carolina, § 172 ; Dacotah, § 102.

² Kansas, § 94. "The answer of the defendant must contain, 1. A general or

§ 582. The provisions relating to the union of various defences, legal or equitable, or both, and of various counterclaims, in the same answer, are similar in all the codes, with unimportant variations, and are as follows: "The defendant may set forth, by answer, as many defences and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished."¹ Another form found in several codes is, "The defendant may set forth, by answer, as many grounds of defence, counterclaim, or set-off, as he may have, whether legal or equitable, or both."²

specific denial of each material allegation of the petition controverted by the defendant. 2. A statement of any new matter constituting a defence, counterclaim, or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language without repetition. 3. When relief is sought, the nature of the relief to which the defendant supposes himself entitled." Minnesota, § 83, as in New York, except that the subd. 1 reads, "a denial of each allegation," &c., and the following is added: "3. All equities existing at the time of the commencement of the action in favor of the defendant therein, or discovered to exist after such commencement, or intervening before a final decision of such action. And if the same are admitted by the plaintiff, or the issue thereon is determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment or otherwise." Iowa, § 2655: "The answer shall contain, 1. The names of the court, of the county, and of the plaintiffs and defendants; 2. A general denial of each allegation of the petition, or else of any knowledge or information thereof sufficient to form a belief; 3. A specific denial of each allegation of the petition controverted by the defendant, or any knowledge, &c.; 4. A statement of any new matter constituting a defence; 5. A statement of any new matter constituting a counterclaim." California, § 437: "The answer of the defendant shall contain, 1. If the com-

plaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief. If the complaint be not verified, then a general denial to each of said allegations; but a general denial only puts in issue the material allegations of the complaint. 2. A statement of any new matter in avoidance, or constituting a defence or counterclaim."

¹ New York, § 150, last paragraph; Wisconsin, ch. 125, § 13; Ohio, § 98, adding "and set-off" after "counterclaims;" Missouri, art. 5, § 13, last paragraph, and § 14, as follows: "Different consistent defences may be stated in the same answer;" Minnesota, § 86; Florida, § 101, last paragraph; Oregon, § 72, last paragraph, omitting the clause concerning legal and equitable defences; California, § 441, with same omission as in the last; North Carolina, § 102; South Carolina, § 173, last paragraph; Dacotah, § 108, last clause.

² Kansas, § 94, last paragraph, adding "and for relief" after "set-off;" Nebraska, § 100, omitting the words "whether legal or equitable, or both;" Indiana, § 56, subd. 3, as follows: "3. The defendant may set forth in his answer as many grounds of defence, counterclaim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered;" Iowa, § 2655, subd. 6, as fol-

§ 583. Most of the codes are in substantial agreement as to the nature and object of the counterclaim. In a few, however, there is a departure from this common type; and in some there are special clauses relating to set-off as a form of defence different from the counterclaim. All these statutory provisions are collected in the text or in the notes. The following definition has been adopted in a majority of the States: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint [petition] as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."¹ The corresponding sections in the codes of Indiana and of Iowa are, however, quite different, and are given at length in the foot-note. It will be seen that they enlarge the scope of the counterclaim, and that, in Iowa, the restriction as to parties is very much modified.²

lows: "6. The defendant may set forth in his answer as many causes of defence or counterclaims, whether legal or equitable, as he may have;" and § 2657, "Each affirmative defence shall be stated in a distinct division of the answer, and must be sufficient in itself, and must intelligibly refer to the part of the petition to which it is intended to apply."

¹ New York, § 150; Ohio, § 94, to and including subd. 1, and omitting the rest. The matter of the second subdivision appears in a subsequent section under the definition of "set-off;" Missouri, art. 5, § 13, as in the text; Minnesota, § 84, as in the text; Florida, § 101, as in the text; Nebraska, § 101, as in Ohio; Kansas, § 95, as in Ohio, and adding the following in reference to the "right to relief," which § 94 expressly permits a defendant to state in his answer: "The right to relief concerning the subject of the action mentioned in the same section (§ 94) must be a right to relief necessarily or properly involved in the action, for a complete determination thereof, or settlement of the questions involved therein." This clause

plainly describes what is often called "an equitable counterclaim," and puts to rest all doubts respecting such a counterclaim in that State. Wisconsin, ch. 125, § 11, as in the text, with the following addition: "When the plaintiff is a non-resident of this State, such counterclaim may arise out of any cause of action whatever existing at the time of the commencement of the action, and arising within this State; provided that no claim assigned to the defendant shall be pleaded as a counterclaim in any action to which this subdivision is applicable;" Oregon, § 72, as in the text, except, in subd. 1, the words "or connected with the subject of the action" are omitted; California, § 438, as in the text, except the words "contract or" are omitted from the first subdivision; North Carolina, § 101; South Carolina, § 173; Dacotah, § 108.

² Indiana, § 59: "A counterclaim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for dam-

§ 584. The "set-off," well known prior to the new system of procedure, and which had been defined and regulated by previous statutes, English and American, is clearly embraced within the second subdivision of the section, as stated in the text, and as found in the codes of New York and of the States which have closely followed that original type. In certain States, however, a special provision is inserted in the codes defining the "set-off," of which the following is the common form: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising on contract, or ascertained by a decision of the court."¹ There are additional special clauses in several of these codes regulating the procedure in respect to "set-off" and "counterclaim," particularly in their relations with the parties to the action. These sections provide for the bringing in of new parties found necessary to the determination of the issues raised by the defendant's affirmative pleading, or for the extending the benefits of a set-off or counterclaim existing in favor of a principal debtor, to his sureties, or existing in favor of one of two or more joint debtors, to the others. These sections are copied in the note.²

ages." Iowa, § 2659: "Each counterclaim must be stated in a distinct count or division, and must be, 1. When the action is founded on contract, a cause of action also arising on contract or ascertained by the decision of a court. [This is identical with the "set-off" of several other State codes, and of all former revisions of the code in Iowa.] 2. A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition, or connected with the subject of the action. [This was the "counterclaim" of all the former revisions of the Iowa Code. Its marked departure from the common type in reference to the parties between whom a several judgment in the action is possible will be noticed.] 3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants, if more than one, against the plaintiff, or all of the plaintiffs, if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held either matured or

not, if matured when so pleaded." [This is the "cross-demand" of former revisions of the Iowa Code, and is broader than the counterclaim, as it may be *any* cause of action, but it must be between all the parties.]

¹ Ohio, § 97; Kansas, § 98; Nebraska, § 104; Indiana, § 57. "The set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of a debt, duty, or contract liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it was offered as a set-off." Wisconsin, ch. 126, containing eight sections, treats of "set-off" with much detail.

² "Whenever it appears that a new party is necessary to a final decision upon the counterclaim, the court may either permit the new party to be made by a summons to reply to the counterclaim, or may direct the counterclaim to be struck out of the answer, and made the subject of a separate action." Ohio, § 96; Kansas, § 97; Nebraska, § 103; Iowa, § 2662; Indiana, § 63: "Whenever it appears

§ 585. A cross-petition or complaint is expressly authorized and its purposes defined in one or two of the State codes; as, for example, in that of Iowa.¹ A section found in most of the codes • provides that "sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose."²

§ 586. *Pleadings by the Plaintiff Responsive to the Defendant's Answer.* All the codes permit the plaintiff to demur to the entire answer, or to any separate defence therein containing new matter, or to any counterclaim therein, on the ground that the same is insufficient, or that the facts therein stated do not constitute a defence or a counterclaim.³

§ 587. In respect to the mode of raising an issue of fact upon the allegations of the answer which are not mere denials, the codes are separated into two classes,—those which require an additional pleading by the plaintiff in order to raise such issues in all instances, and those which require such additional pleading only in response to counterclaims. In the first class, a reply by the plaintiff is needed to all answers or defences that set up new matter, whether as counterclaims or as defences simply, which reply may consist either of denials or of other new matter by way

that a new party is necessary to a final decision upon the set-off, the court shall permit the new party to be made, if it also appears, that owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set-off." Ohio, § 98; Kansas, § 99; Nebraska, § 105. "A co-maker or surety, when sued alone, may, with the consent of his co-maker or principal, avail himself, by way of counterclaim, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-maker or principal; but the plaintiff may meet such counterclaim in the same way as if made by the co-maker or principal himself." Iowa, § 2661: "In all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant against the plaintiff, or any former holder of the note or other contract, may be pleaded as

a set-off by the principal or any other defendant." Indiana, § 58.

¹ Iowa, § 2663: "When a defendant has a cause of action affecting the subject of the action against a co-defendant, or a person not a party to the action, he may, in the same action, file a cross-petition against the co-defendant or other person. The defendants thereto may be notified as in other cases, and defence thereto shall be made in the time and manner prescribed in regard to the original petition."

² New York, § 152; Wisconsin, ch. 125, § 15; Minnesota, § 86; Missouri, art. 5, § 19; Indiana, § 77; Iowa, § 2707; Florida, § 102; Oregon, § 74; California, § 453; North Carolina, § 104; South Carolina, § 175.

³ New York, § 153; Wisconsin, ch. 125, § 16; Ohio, § 101; Missouri, art. 5, § 15; Minnesota, § 87; Kansas, § 102; Nebraska, § 109; Iowa, § 2664; Indiana, § 64; Florida, § 108; Oregon, § 76; California, §§ 443, 444; North Carolina, § 105; South Carolina, § 176; Dacotah, § 106.

of avoidance. As a consequence of this requirement, every allegation of new matter in the answer, whether by way of defence or of counterclaim, not controverted by a reply, is, in such States, admitted to be true. The reply is the last pleading of fact; the defendant may demur to it, but not rejoin any defence of fact.¹

§ 588. In the second class of codes, a reply is only necessary to a counterclaim. Whenever an answer contains new matter by way of defence, and not constituting a counterclaim, an issue of fact is raised by operation of law, and the plaintiff may prove, in response thereto, any facts by way of denial or of confession and avoidance. If a counterclaim is pleaded, the plaintiff must reply thereto either by denials or by confession and avoidance; and in the absence of such reply, the allegations of the counterclaim are admitted to be true. No pleading is permitted in response to the reply except a demurrer, which may be used to raise an issue of law.²

¹ In this class are the following codes: Ohio, § 101: "When the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition constituting an answer in law to such new matter. To this reply the defendant may demur." § 127: "Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegations of new matter in the reply shall be deemed controverted by the adverse party as upon a direct denial or avoidance." So also in Missouri, art. 6, §§ 15, 36; Kansas, §§ 102, 108, 128; Nebraska, §§ 109, 184; Indiana, §§ 67, 74; Oregon, §§ 75, 92. Iowa, § 2665: "There shall be no reply, except, 1. When a counterclaim is alleged; or, 2. When some matter is alleged in the answer to which the plaintiff claims to have a defence by reason of the existence of some fact which avoids the matter alleged in the answer." § 2666: "When a reply must be filed, it must consist of, 1. A general denial of each allegation or counterclaim controverted, or of any

knowledge or information thereof sufficient to form a belief; or, 2. Any new matter, not inconsistent with the petition, constituting a defence to the new matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the petition, which avoids the same."

² Wisconsin, ch. 125, § 16: "When the answer contains new matter constituting a counterclaim, the plaintiff may reply to such new matter denying [generally or] specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint constituting a defence to such new matter in the answer [this section shall not be construed to permit the plaintiff to reply a specific cause of action which he might have inserted in his complaint];" and §§ 17, 18, 33, 34: Also Minnesota, §§ 87, 88, 89; New York, §§ 153, 154, 155, 168. To the foregoing provision defining the use of a reply, § 153 of New York adds the following: "And in other cases, where the answer contains new matter constituting a defence by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter; and, in that case, the

§ 589. The foregoing is the general scheme of pleading as set forth, with slight variations of form, and with no real variations of principle, in all the codes. A few additional provisions are found in some of the codes which do not in any manner affect the common theory, but which were evidently inserted for purposes of exactness, or to put at rest some doubts as to the construction of the statute. These clauses I have collected in the note.¹

§ 590. While the very central principle of the reformed procedure is, that all causes of action, and all defences, except those of general denial, must be specially pleaded, — that is, pleaded in accordance with the actual facts, — and while, as a necessary consequence, there must be an agreement between the facts proved and the facts alleged, yet the codes are careful to prevent any failure of justice by reason of a mere failure to comply with this rule. Ample means of correcting mistakes are provided. The utmost liberality in this respect runs through them all, and the provisions are the same in substance, and almost identical in language. As these clauses apply alike to the pleadings by the plaintiff and by the defendant, they have already been stated in the preceding chapter.²

§ 591. Upon the basis of the foregoing citations, I am prepared to present the theory of the defence as formulated in the codes, and as wrought out by the judicial interpretation thereof. The fundamental principles of pleading adopted by the reformed American system, and applicable alike to the allegations made by the plaintiff and by the defendant, have already been discussed

reply shall be subject to the same rules as a reply to a counterclaim." Florida, §§ 103, 104, 105, 118, as in New York; North Carolina, §§ 105, 127; South Carolina, §§ 176, 191; Dacotah, §§ 106, 108, 121. In California no reply is allowed in either case.

¹ Missouri, art. 5, § 21: "*Duplicity* is a substantial objection to the petition or other pleading, and shall, on motion, be stricken out." § 82: "In all actions founded on contract, and instituted against several defendants, the plaintiff shall not be nonsuited by reason of his failure to prove that all the defendants are parties to the contract, but may have judgment against such of them as he shall prove to be parties thereto." Kansas, § 104: "When the answer contains new matter constituting a right to relief

against a co-defendant, concerning the subject of the action, such co-defendant may demur or reply to such matter in the same manner as if he were plaintiff, and subject to the same rules so far as applicable." Iowa, § 2867: "Any number of defences, negative or affirmative, are pleadable to a counterclaim; and each affirmative matter of defence in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply." Indiana, § 66: "All defences, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially." § 91: "Under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove."

² *Supra*, § 435.

in the preceding chapter; and I shall, therefore, confine myself to matters purely defensive. Following an order suggested alike by the mode of arrangement pursued in the statute, and by the logical development of the subject-matter itself, the chapter will be separated into sections, which will treat respectively, I. Of the general requisites of an answer, and of the general rules applicable to all answers; II. Of answers or defences consisting of denials either general or specific; III. Of answers or defences consisting of new matter; IV. Of the union of different defences, whether legal or equitable, in one answer; V. Of counterclaims, and other affirmative relief.

SECTION SECOND.

THE GENERAL REQUISITES OF AN ANSWER, AND THE GENERAL RULES APPLICABLE TO ALL ANSWERS.

§ 592. Before examining the different kinds of defence possible under the codes, and the particular rules relating to each, I shall state and explain the few doctrines and rules which apply to *all forms* of answer, and which have not been already embraced in the discussion of the general principles of pleading contained in the preceding chapter. There are a few doctrines, practical rather than theoretical, pertaining to the answer considered as an independent pleading, which should be investigated before proceeding with the mass of detail which will make up the bulk of the present chapter.

§ 593. Answers are separated by the codes into two classes, — those which consist of denials, and therefore serve the sole purpose of raising a direct issue upon the plaintiff's allegations; and those which state what the codes call "new matter," — that is, facts different from those averred by the plaintiff, and not embraced within the judicial inquiry into their truth. The latter class is again subdivided into those in which the "new matter" is simply defensive, and, if true, destroys or bars the plaintiff's right of action; and those in which the "new matter" is the statement of an independent cause of action in favor of the defendant against the plaintiff, which is to be tried at the same time with that set up by the plaintiff, to the end that a recovery upon it may be used in opposition to the recovery upon the plaintiff's demand,

by either diminishing, equalling, or exceeding the same. It is plain, from this brief description, that the answers included in the latter subdivision are not, in any true sense of the word, *defences*; they do not defeat or bar the plaintiff's right of action. They are, in truth, independent causes of action in favor of the defendant, — cross-demands, — which, for purposes of convenience merely, are tried and determined at one and the same time. There are two suits, to neither of which, perhaps, exists any defence, litigated and decided in the one judicial proceeding; and the final balance in favor of one party is awarded to him by the single judgment of the court. This is the true theory of the answers embraced in the last subdivision; and it is fully approved and adopted by decisions of authority which will be cited in the subsequent section, which treats of the "counterclaim."

§ 594. Two kinds of questions may arise in reference to all answers, — namely, (1) those of substance and (2) those of form. The first class relate to the sufficiency of the pleading, assuming that its allegations are correct in respect to their merely formal character; the second class relate exclusively to the form and external mode of setting forth the facts, assuming that, if properly stated, they would be sufficient to constitute a valid answer. It is difficult to conceive that a question of substance should arise upon an answer consisting only of denials. Such an answer might be insufficient: it might raise no complete issue, because its denials were too limited, and were interposed to a part only of the plaintiff's allegations, thus admitting by their silence other averments to such an extent that a cause of action in his favor was conceded upon the record; but here the question of substance would not arise from the matter contained in the answer, but from the absence of matter therein. The questions that can arise upon an answer of denials must, therefore, be those of form, — questions whether the denials themselves are in such a form that the averments of the complaint, or some of them, are sufficiently negatived in order to present an issue or issues for trial and decision. If the answer falls within the second class, — that is, if it sets up new matter, either by way of defence, or by way of counterclaim, set-off, or cross-demand, — the questions arising upon it may be either of substance or of form.

§ 595. What can be the possible nature of these questions of substance? The section of the codes enumerating the grounds

of demurrer to the complaint or petition contains a complete list of such questions. As found in most of the codes, they are six in number, — namely, (1) want of jurisdiction in the court over the person of the defendant, or the subject-matter of the action; (2) want of legal capacity to sue in the plaintiff; (3) the pendency of another action between the same parties for the same cause; (4) defect of parties plaintiff or defendant; (5) a misjoinder of causes of action; (6) failure to state facts constituting a cause of action. To these there is added, in one or two codes, (7) a misjoinder of parties plaintiff or defendant. It is very plain that, except in a special case to be mentioned hereafter, only one of these species of substantial questions can possibly arise in respect to the answer, namely, the sixth, whether the facts stated are sufficient to constitute a defence. Objections as to the jurisdiction of the court, the legal capacity of the plaintiff to sue, the pendency of another action, and the misjoinder of causes of action, must necessarily be confined to and be decided by the complaint or petition. If the plaintiff's pleading is free, the answer can in no manner be exposed to any of them. It may, of course, set up these objections as matters of defence; but the objection would still inhere in the plaintiff's cause of action and pleading, and would not be involved in the answer itself. The same is true in respect to the nonjoinder or misjoinder of parties in all cases where the answer is simply defensive. It may certainly aver a nonjoinder or a misjoinder as a defence; but the question thus raised would still depend upon the complaint or petition; the answer could not by itself, as the initiative, create a nonjoinder or misjoinder of parties. There is one special case, however, in which the answer may, for the first time, involve the question as to the proper joinder of parties. Where it sets up a counterclaim or set-off, and the defendant thus makes himself, in respect to such demand, a plaintiff in fact, though not in name, the answer may be governed by the same rules which govern the complaint or petition. The cause of action thus alleged may be of such a character that the original parties to the record are either too few or too many. An answer of this class may therefore, in itself, and by means of its own averments, independently of the plaintiff's pleading, raise and involve questions of substance relating to the proper joinder of parties to the action. The codes of several States recognize this fact, and expressly provide for the bring-

ing in of additional parties made necessary by the allegations of a counterclaim or set-off. With this single exception, it is plain that the only questions of substance which can arise in respect to any answer must relate to the sufficiency of the facts alleged to constitute a defence, or counterclaim, or set-off. Upon this assumption, the language employed by the legislature in some of the States permits a demurrer to the answer on the ground of "insufficiency;" in others, "where, upon its face, it does not constitute a counterclaim or defence;" and, in others still, "where the facts alleged do not constitute a defence or counterclaim." And recognizing the further fact, that these questions of substance cannot arise upon answers which consist only of denials, the language of several codes confines the demurrer to "new matter," set up in the answer by way of defence or counterclaim.

§ 596. Under the common-law system of procedure, the questions of substance in the defendant's pleas, if the objection appeared on their face, were raised by a general demurrer, while those of form were raised by a "special demurrer." The reformed procedure retains the general demurrer for the same purpose which it subserved at the common law. Where the answer, as in some States, or the new matter in the answer, as in others, does not state facts constituting a defence, or counterclaim, or set-off, as the case may be, a demurrer, on the ground of insufficiency, is the proper mode of raising and presenting the question for decision to the court. Special demurrers, however, are utterly abolished. If the defect is one merely of form; if the denials, for example, — although sufficiently addressed to the plaintiff's allegations to indicate the intended issues, — are so formally defective that it is a question whether the denial or denials attempted to be made do in fact accomplish the purpose for which they were designed; or if the averments of new matter in some sort embrace or refer to facts which, if properly pleaded, would amount to a defence or counterclaim, but are stated in such an uncertain, ambiguous, inferential manner, that it is a question whether they can avail to the defendant, — in such cases it is settled that the demurrer is not the proper mode of reaching the defect. Instead of the special demurrer, the codes have substituted the motion to make the pleading more definite and certain. If no such motion is made, and the plaintiff goes to trial upon the answer as it

stands, he will not be suffered to raise the objection there for the first time, and to exclude evidence of the defence or counterclaim on the ground that it is informally pleaded.

§ 597. This general rule is well settled ; but there has been some conflict of decision in its practical application, and judges have occasionally made use of very inaccurate language while invoking it, which has tended to add confusion to a matter which should be kept clear and certain. Thus, judges of great learning and ability, and who are usually guarded in their choice of expressions, in discussing the character of pleadings, both complaints or petitions and answers, when the objection to them was presented for the first time at the trial, and evidence in support of the cause of action or defence was opposed on the ground then first stated, that the allegations were insufficient, have said, that although the pleading was in fact defective, *and even though it was so defective as to be demurrable*, yet, as the adverse party had not demurred, nor moved to make it more certain, but had gone to trial upon it, he had thereby waived all objection to its sufficiency. This language is certainly inaccurate, and unnecessarily confuses a subject which is in itself not free from difficulty. It is, beyond a doubt, true, that if the answer or other pleading is defective in such a manner, and to such an extent only, that the proper method of correction is a motion to make it more definite and certain, and if the adverse party omits to make the motion, but goes to trial, he thereby waives the objection, and cannot raise it by attempting to shut out evidence of the cause of action or defence. But if the defect is of such a nature that a demurrer is proper, and the pleading would be held insufficient upon a demurrer, it is equally certain that the adverse party does not waive the objection by going to trial without demurring. If the pleading was a complaint or petition, the ground of demurrer would necessarily be, that it did not state facts sufficient to constitute a cause of action ; and, by an express provision of all the codes, this ground is not waived by answering and going to trial. If the pleading was an answer, the ground of demurrer would still be that the facts stated did not constitute a defence or counterclaim ; and if it did not, in fact, allege a defence or counterclaim, none could be proved under it at the trial. The rule, with its proper limitations, is a correct one, and operates in the interests of justice and good faith ; but if acted upon in the broad manner as above

recited, it would tend to destroy all certainty and accuracy in pleading. If the deficiencies are such that a motion is the proper mode of cure, they are necessarily of form, and not of substance; the adverse party is not in fact misled; and a neglect on his part to apply the remedy in an early stage of the cause ought to be and is a waiver of all objection, so that the cause of action or defence, as the case may be, can be proved, notwithstanding the ambiguity and indefiniteness of the averments.

§ 598. Adopting the rule in this restricted scope, there are still cases of doubt and of conflict in its application. In some answers a defect of substance is plain; the facts alleged clearly constitute no defence: in others the deficiencies are as plainly formal; the necessary facts are all mentioned; no doubt can exist as to the actual intent and meaning, but still some requirements as to form and method have not been complied with. Between these two extremes there are cases bordering upon the dividing-line, in which it is difficult to determine with certainty whether the defect is one of form merely, or whether it passes the limit, and is one of substance. In such instances we shall naturally find a conflict of decision among different judges, and we shall even discover the same court vacillating, in one case applying the liberal doctrine and holding the objection waived, and, in another not essentially different, enforcing the stricter rule, pronouncing the answer entirely bad, and wholly rejecting it. In some of the decisions to which I shall refer, it would seem that able courts have neglected their own precedents, and forgotten the rule imposed upon them by the statute, which abrogates the inequitable common-law doctrine of an interpretation adverse to the pleader, and requires a liberal construction with a view to substantial justice between the parties. It is only by a comparison and analysis of these decisions that a practical result can be reached, and a general principle deduced; and I shall therefore cite, either in the text or in the notes, the leading cases which have passed upon this important question.

§ 599. The authorities are uniform that a mere defect of form, as it has been already described, must be cured by a motion, and not by a demurrer. In an action to foreclose a purchase-money mortgage of land conveyed by the plaintiff to the defendant, the answer set up covenants in the deed of conveyance, and a breach of them; namely, "that the plaintiff was not seized of the prem-

ises, as of a good and indefeasible estate in fee," &c., negating all the covenants. To this the plaintiff replied, and instead of averring "that he was seized," &c., said, "And the plaintiff denies that at the time, &c., he was not seized in fee of the said premises," &c., and in this manner met all the allegations of the answer. The defendant demurred for insufficiency. It was held by the court that "insufficiency" as a ground of demurrer implies that the allegations do not constitute any defence or denial to the adverse pleading. The insufficiency relates to the substance of the averments as a whole, rather than to the form of the expression. The reply in this case was defective in form, but the substance thereof was good; that is, it stated a *denial* in an improper manner, and the remedy therefor was not by demurrer, but by motion to render the allegations more definite and certain.¹ Although this decision was made in reference to a reply, the principle applies equally to an answer.

§ 600. That all objections of mere form to the answer are waived by a neglect to move, and by going to trial thereon, is sustained by numerous cases; and some of them apply the rule to answers in which the deficiencies were very considerable, even so great as to have rendered the pleading demurrable in the opinion of the court pronouncing the decision. In *White v. Spencer*,² which was an action for flowing plaintiff's lands, the answer set up facts showing a user and enjoyment by defendant of the easement for more than twenty years, but did not aver that this user was *adverse*. The plaintiff replied a general denial, and on his objection all evidence in support of the answer was excluded at the trial. On appeal from the judgment ren-

¹ *Flanders v. McVickar*, 7 Wisc. 372, 377. See, to the same effect, *Spence v. Spence*, 17 Wisc. 448, 454; *Hart v. Crawford*, 41 Ind. 197; *Snowden v. Wilas*, 19 Ind. 10; *Fultz v. Wycoff*, 25 Ind. 321; *Phoenix v. Lamb*, 29 Iowa, 352, 354; *First Nat. Bank of New Berlin v. Church*, 3 N. Y. S. C. 10. The answer averred that defendant "had no knowledge or information thereto," which was held to be an improper form of denial; but the plaintiff's remedy was by motion, and the defect had been waived. *Seeley v. Engell*, 13 N. Y. 542, 548, per Denio J.: "The alleged mistake was set up in the answer,

and denied by the reply. If the allegation in that respect was too general in its terms, the remedy of the plaintiff was by motion, under § 160, to compel the defendant to make it more certain." See also *Stringfellow v. Alderson*, 12 Kans. 112; *Lathrop v. Godfrey*, 6 N. Y. S. C. 96; *Hutchings v. Castle*, 48 Cal. 152; *Jackson Sharp Co v. Holland*, 14 Flor. 384, 389; *a fortiori* such an answer cannot be objected to for the first time on appeal. *Green v. Lake Superior, &c. Co.*, 46 Cal. 408.

² *White v. Spencer*, 14 N. Y. 247, 249, 251.

dered in favor of the plaintiff, the New York Court of Appeals held that the user must be adverse, and that the plaintiff might have successfully demurred to the answer, because an averment of such adverse user was omitted; but that, by replying, and going to trial, he had waived the objection. Denio, J., said: "I am of opinion that the plaintiff, having treated the allegation in the answer as a sufficient statement of defence by replying to it, and by going to trial without objection, is precluded from objecting to evidence to sustain it." He cited cases showing that the same rule prevailed under the old system,¹ and added: "We have decided, it is true, that it is the duty of the judge on the trial to reject evidence offered in support of immaterial issues.² But an issue is not immaterial, within the meaning of this rule, on account of the omission of some averment in a pleading which is essential to the full legal idea of the claim or defence which is attempted to be set up. *If the court can see, as in this case, what the matter really attempted to be pleaded is*, the issue is not immaterial, though it may be defectively stated." In this last sentence Mr. Justice Denio has given a very clear and accurate description of *mere defects in form*, which are waived by a neglect to correct them by motion. Whether the principle was properly applied to the case before him, is, as it seems to me, more than questionable. The answer did not attempt to state an *adverse user*, and simply fail to state it with accuracy; it omitted any such averment entirely; it, therefore, set up no defence at all. When it is said that, if the court can *plainly see* what the matter really attempted to be pleaded is, the deficiency is formal, it is not intended that the court may be able, from their knowledge as lawyers and their experience as judges, to *guess* with reasonable certainty what the pleader designed; they must be able to gather from the legal import of the facts which are alleged — although improperly alleged — the nature of the defence relied on; in other words, the substantial facts which constitute that defence must, in some manner, appear on the record. A defence of fraud could hardly be considered sufficient at the trial, from which all averments of the *scienter* had been omitted; and yet a fact was here wholly left out of the answer which was as essential in making up the

¹ Meyer v. McLean, 1 Johns. 509; 2 id. 188; Reynolds v. Lounsbury, 6 Hill, 584.

² Corning v. Corning, 6 N. Y. 97.

defence as the guilty knowledge is to constitute the fraud. Although the reasoning of Mr. Justice Denio is admirable in its definition of the general rule, his conclusion cannot be reconciled with some subsequent decisions of the same court.

§ 601. In *Simmons v. Sisson*, the subject was discussed at large both upon principle and upon authority.¹ The reasoning of the court, and the decision upon it, are, in the main, in perfect accord with the spirit and letter of the codes, and well express the liberal design of the reformed procedure. The only criticism

¹ *Simmons v. Sisson*, 26 N. Y. 264, 271. The action was brought by the plaintiff, treasurer of a corporation, against the defendants, as stockholders. The complaint alleged that the plaintiff had, by order of the directors, advanced and expended a certain sum more than he had received from its funds, and that the corporation was indebted to him therefor. The answer contained two defences,—1. It denied that the corporation was indebted to the plaintiff in said sum, or in any other sum; 2. It alleged that the plaintiff had been directed by the corporation to expend the earnings thereof, and no more; that with knowledge of such direction, and of the amount of such earnings, he had expended more than said amount, contrary to the wishes and instructions of the corporation, and in his own wrong. On the trial, the referee held that this answer admitted the allegations of the complaint, that the plaintiff had expended the sum mentioned over and above the earnings, and had done this by order of the directors. On appeal from the judgment rendered in favor of the plaintiff, Selden J., who delivered the opinion of the court, declared that the first defence was the exact equivalent of *nil debet* at the common law, and was a good general denial under the code, and then proceeded as follows: “But whether the preceding position is correct or not, it was too late to object at the close of the trial that this division of the answer did not put the fact of indebtedness in issue. Under the former system of pleading, *nil debet* to an action of debt on bond or judgment was bad on general demurrer; but if, instead of demurring, the plaintiff went to trial on that issue, it was always held to put him to

proof of his cause of action. Starkie on Ev. 140; 2 Phil. Ev. Cow. & H.’s ed. 168; 1 Ch. Pl. (Springfield ed., 1844) 438; *Meyer v. McLean*, 2 Johns. 183; *Rush v. Cobbett*, 2 Johns. Cas. 256, per Radcliff J. . . . I think, therefore, that, under the strictest rules of special pleading, the first defence of the answer, if not objected to as insufficient before trial by demurrer, would always have been held sufficient, on the trial, to put in issue the cause of action; and that, in view of the provisions of the code in reference to the construction of pleadings, the referee erred in holding that the defendants had admitted the indebtedness of the corporation, when they expressly denied it. There are, I think, much stronger reasons now for holding such an answer sufficient, on the trial, to put the question of indebtedness in issue than there were when the decisions were made to which I have referred. Parties are now provided with short and cheap methods by motion to compel defective pleadings to be amended, stricken out, or that judgment be pronounced upon them summarily; and they can have no excuse for reserving such objections until the close of the trial. I am of opinion, that, when that course is taken, the party must stand upon the pleadings and evidence together; that the judgment must be such as the whole case, pleadings and evidence united, demands; and that it would be the duty of the court, under § 176, to disregard defects in the pleadings not before noticed, or to order the required amendments under §§ 170, 178. If, however, the case should be such as to satisfy the court that neither party had been misled by defects in the pleadings, it should be disposed of under § 169.”

which must be made upon the opinion — and it is a most important one — is upon that portion which draws analogies from the common-law system. Certainly none of the special common-law rules which distinguished the cases in which a particular form of general issue could be used, and which defined the office of a demurrer either general or special as applied to such pleas, are preserved; they have all been swept away, and any trace of them only serves to obscure the clear principles which find an expression in the codes.¹

§ 602. In an action upon a promissory note, the defendant, an accommodation-maker, pleaded the defence of payment by the payee, and on the trial proved, under objection, a delivery of lumber by said payee to the plaintiff, and the receipt thereof by him in full satisfaction of the demand. The New York Court of Appeals, after holding that the answer was good, and that under a defence of payment the defendant may prove a payment in cash or in any other manner, added: "If the particulars of the transaction between the payee and the plaintiff were not sufficiently disclosed by the answer, the plaintiff's remedy was a motion under § 160 of the code. He could not accept the plea, and go to trial upon it, and then interpose the objection for the first time that it was not sufficiently descriptive of the particulars relied on as constituting payment."² In *Chamberlain v. Painsville, &c. R. R.*,³ the Supreme Court of Ohio applied the rule sanctioned by *Simmons v. Sisson* to an answer equally faulty with the one in the latter case in its denial of legal conclusions rather than of issuable facts. The action being upon a promissory note, the answer was, "That the said note in said petition mentioned, was and is wholly without consideration, and void." No motion was made to compel more specific averments, and the parties went to trial. The court, after saying that the defendant might have been required to make the defence more definite and

¹ Even though the general issue *nil debet*, when improperly pleaded in debt upon a specialty, might be reached by a general demurrer, it is very clear that the first defence in the case above mentioned was not *demurrable* upon any true construction of the provisions found in the codes. It was an *attempted* denial, and it actually contained denials: its real defect was that it denied the *legal* conclusion from the

facts alleged by the plaintiff, and not the facts themselves. The only proper mode to correct it would have been a motion. All that was said of its resemblance to *nil debet* was utterly outside of the questions before the court.

² *Farmers' Bank v. Sherman*, 33 N. Y. 69, 79.

³ *Chamberlain v. Painsville, &c. R. R.*, 15 Ohio St. 225, 251.

certain, added: "Under the broad issue thus chosen by the parties, any evidence would have been admissible which tended to impeach or sustain the consideration of the note." The answers in this case and in *Simmons v. Sisson* closely resembled each other in their defects and in their violation of the principles of pleading introduced by the codes. In both, the defendants designed to raise an issue of fact which would go to the whole cause of action. The defect was not a misconception of the defence, nor a reliance on matters which constituted no defence; it was only an imperfect manner of stating a defence which was in itself perfect. Under a true construction of the codes, neither of these answers was demurrable. If the plain distinction established by the statutes is to be preserved, it is clear that a motion to make the pleading more definite and certain is the only mode of curing defects of this kind. I am aware that demurrers have been sustained to such defences, on the ground that they were conclusions of law, and not allegations of fact; but the courts have sometimes overlooked the distinctions in this respect created by the legislature.

§ 603. I repeat, the doctrine would be an anomaly that an answer may be demurrable because it fails to set up any defence or counterclaim, and still become a sufficient pleading so as to admit proof of the defence or counterclaim from the plaintiff's neglect to demur or to object in some other manner prior to the trial. This proposition has, nevertheless, been expressly sanctioned by the courts in certain cases, although it is not supported by the weight of judicial authority, and is certainly not sustained by principle. *Roback v. Powell*¹ is an example of these decisions. This case goes farther than any of those before cited, and certainly farther than the rule invoked will warrant. A counterclaim is an independent cause of action, in which the

¹ *Roback v. Powell*, 86 Ind. 515, 516. The action was upon an injunction bond given by Mrs. Roback. The injunction had restrained the plaintiff from taking down a house which stood upon her land. She pleaded, 1, a general denial, and, 2, as a counterclaim, that Powell entered upon her land in her possession, and tore down her house, and carried the same away, to her damage \$2,000, for which sum she demanded judgment. The plaintiff replied by a general denial, and went to

trial. All evidence in support of the counterclaim having been excluded, the Supreme Court of Indiana held, upon the defendant's appeal, that as the action was on a contract, and the counterclaim was for an alleged tort, the latter was in every way improper, and could not be sustained had it been properly objected to; but that all objection to it had been waived by the replying and going to trial, and therefore the evidence in its support should have been received.

defendant becomes the actor, and assumes the character of a plaintiff. The occasions and purposes in and for which it may be set up are carefully prescribed, and it was conceded that this answer did not come within the statutory definition. If the decision be correct, on the same principle it ought to be held that a defendant waives all objection to the sufficiency of a complaint or petition which does not state facts constituting a cause of action, when he answers it and goes to trial.

§ 604. Notwithstanding this array of cases in which the liberal rule of construing the pleadings has been sometimes pushed even to an unwarrantable extreme, there are others in which the courts have entirely disregarded the doctrine, have overlooked their own precedents, and have gone to as great a length in the opposite direction. In *Manning v. Tyler*, an action was brought upon a promissory note against R. as maker, and T. as indorser.¹ Although the answer of the defendants was held to be frivolous, yet the dissenting opinion of Mr. Justice Denio, rather than that of the court, seems to express the rule established by the code. The deficiencies in this answer were certainly no greater than

¹ *Manning v. Tyler*, 21 N. Y. 567. The answer set up usury in the following manner: That, about six months before the date of the note in suit, R. made a note at three months, and T. indorsed the same for his accommodation, which was made for the purpose of enabling R. to raise money thereon; that R. applied to the plaintiff for a loan thereon, who, thereupon, did loan R. the said money thereon at a greater rate of interest than seven per cent per annum; that said note was renewed from time to time [stating when and how], and that, at each of said renewals, the plaintiff received, and the defendants agreed to pay, a greater rate of interest than at the rate of seven per cent per annum; that all of these transactions were at the city of Syracuse; wherefore the defendants insist that the note mentioned in the complaint [which the answer shows to be the last in the series] is usurious and void. The plaintiff's motion for judgment, on account of the frivolousness of this answer, being granted, the defendants appealed to the Court of Appeals, from whose opinion the following extract is taken: "That

the answer in this case is bad within all the rules of pleading heretofore recognized in the courts, cannot, I think, be questioned. It consists, in effect, of nothing more than a general averment that the note on which the suit is brought is void for usury. It does not aver what the usurious agreement was, between whom it was made, the quantum of usurious interest that was agreed upon and received, nor that the agreement was intentionally usurious and corrupt. The old rule of pleading required all this particularity." It was further said, that although the plaintiff might have moved to make the answer more certain and definite, yet, as the answer presented no defence at all, he was not obliged to resort to that remedy. Denio J. dissented from this judgment, holding that the answer was simply defective in omitting allegations; that it set up a good defence in an imperfect manner, and the remedy was therefore by motion. See also *Gaston v. McLeran*, 8 Oreg. 389, 391; *Taggart v. Risley*, 8 Oreg. 306; *Freitag v. Burke*, 45 Ind. 38, 40.

those in other pleadings to which the liberal mode of construction had been applied by the same court. The pleader did allege something more than the broad conclusion that the note was usurious, and the criticism of the court in this respect was without foundation in fact: he detailed the issuable facts with such minuteness and certainty, that no one could be misled as to the exact nature of the defence. The narrative was undoubtedly incomplete, and it should have been perfected upon the plaintiff's motion; but this is all that can be objected to it. The court may have been unconsciously influenced in their decision by a feeling of distaste for the defence of usury, and thus led to apply a stricter rule of construction than they would have enforced in respect to other defences.

§ 605. The case of *Lefler v. Field*¹ is in yet stronger contrast with the general course of authorities, and with the express requirement of the codes that the pleadings must be construed liberally with a view to substantial justice between the parties, and not adversely to the pleader. The action was for the price of barley bargained and sold. The answer set up that the barley was contracted for by an agent of the defendants, who agreed to buy it if it was good and merchantable; that the plaintiff represented said barley to be a good, first quality, merchantable article; that the agent relied on such representations; that the barley was not merchantable, which fact was known to the plaintiff, and therefore the defendants refused to accept the same. No demurrer was interposed, nor motion made; and the parties went to trial on the pleadings as they stood. The Court of Appeals held that no evidence was admissible to establish the defence; that the answer did not allege a defence of fraud, since it omitted to state two necessary elements thereof; (1) that the plaintiff made the representation with the intent to deceive, and (2) that the defendants or their agent were in fact deceived.

§ 606. When two or more defendants are sued and unite in one responsive pleading, it must be good as to each and all of these parties, or it will be wholly bad. This is the rule which prevails almost universally. Thus, if the defendants join in an answer which on demurrer proves to be insufficient as to one, it will be adjudged bad as to all; but the result will, of course,

¹ *Lefler v. Field*, 62 N. Y. 621. Compare *Hutchings v. Castle*, 48 Cal. 152.

be otherwise if they plead the same answer separately.¹ On the same principle, if two or more defendants unite in a demurrer to the complaint or petition, and a good cause of action is stated against one or some of them, the demurrer will be wholly overruled.² The rule is extended by analogy to pleadings containing two or more separate defences or causes of action. If a demurrer is interposed to an entire answer containing two or more separate defences, or to an entire complaint containing two or more causes of action, it will be overruled if there is one good defence or one good cause of action.³ In an action for a joint and several tort against several defendants, where the answer of one is a complete justification of the alleged wrong as to all, and the others either suffer a default or plead different defences, if the issues raised by this answer are found against the plaintiff, the verdict will operate for the benefit of all the defendants, and he cannot recover a judgment against those even who made default.⁴

§ 607. It was an inflexible rule under the common-law system that every plea in bar must go to the whole cause of action, and must be an entire answer thereto on the record: with pleas in abatement the rule was different, for they did not purport to answer the cause of action. The spreading of a partial defence upon the record was unknown. Whenever such defences were to be relied upon, — as, for example, mitigating circumstances, — they were either proved under the general issue, or under a special plea setting up a complete defence which the pleader knew did not exist. The code has certainly abolished this doctrine and the practice based upon it. Several features of the new procedure are utterly inconsistent with it. In the first place, the general or special denials of the code are not so broad as the general issues of the common law most in use had become;

¹ *Morton v. Morton*, 10 Iowa, 58.

² *McGonigal v. Colter*, 32 Wisc. 614; *Webster v. Tibbits*, 19 Wisc. 438.

³ *Jeffersonville, &c. R. R. v. Vancant*, 40 Ind. 233; *McPhail v. Hyatt*, 29 Iowa, 137; *Modlin v. North West. T. Co.*, 48 Ind. 492; *Excelsior Draining Co. v. Brown*, 47 Ind. 19; *Towell v. Pence*, 47 Ind. 304; *Davidson v. King*, 47 Ind. 372; *Washington Town'p. v. Bonney*, 45 Ind. 77; *Silvers v. Junction R. R.*, 43 Ind. 435, 442-445.

⁴ *Williams v. McGrade*, 13 Minn. 46.

The action was for taking and converting chattels. All the defendants except two united in a general denial. One, McG., set up another action pending. The defendant C. alone justified as sheriff under an execution against one H. D. W., alleging that the goods were the property of said H. D. W. On the trial, this justification was proved, and it was held to enure for the benefit of all the defendants. See also, to the same effect, *Devyr v. Schaefer*, 55 N. Y. 446.

and, as will be particularly shown in the following section, they admit of no evidence not in direct answer to the plaintiff's allegations. In the second place, the verification of pleadings introduced by the codes cuts off all averment of fictitious defences. In the third place, the statute expressly authorizes the defendant to set forth "as many defences as he may have;" and this has been very properly construed as a direct permission, and even requirement, to plead partial as well as complete defences. Notwithstanding this express statutory provision, there has been some conflict of opinion among the courts in respect to the pleading of mitigating facts and circumstances. Certain judges have found it impossible to forget the technical methods of the old procedure, and have seemed determined to treat them as still existing in full force and effect; while others have readily adopted the spirit as well as the letter of the reformed system. I shall, therefore, postpone the discussion of this particular subject — the pleading of mitigating circumstances — until the sections are reached which treat of the "general denial" and of "new matter."

§ 608. While partial defences are to be pleaded, it is well settled that they must be pleaded *as such*. If a defence is set up as an answer to the whole cause of action, while it is in fact only a partial one, and even though it would be admissible as such if properly stated on the record, it will be bad on demurrer: the facts alleged will not constitute a "defence;" which word, when thus used alone, imports a complete defence. The practical result of this doctrine is, simply, that the pleader must be careful to designate the defence as partial; he must not content himself with simply averring the facts as in an ordinary case, as if they constituted a full answer to the cause of action, but he must expressly state that the defence is partial. In the absence of such statement, it will be assumed that he intended the defence to be complete.¹

¹ *Fitzsimmons v. City Fire Ins. Co.*, 18 Wisc. 234; *Traster v. Snelson's Administrator*, 29 Ind. 96; *Sayres v. Linkhart*, 25 Ind. 145; *Conger v. Parker*, 29 Ind. 380; *Stone v. Lewman*, 28 Ind. 97; *Sanders v. Sanders*, 39 Ind. 207; *Yancy v. Teter*, 39 Ind. 305; *Bouslog v. Garrett*, 39 Ind. 338; *Summers v. Vaughan*, 35 Ind. 323, and cases cited. In *Fitzsim-*

mons v. City Fire Ins. Co., *supra*, it was said by Cole J., at p. 240: "The appellant contends that, if this answer is not good as a total defence, it is good as a partial defence to the action. The difficulty with this position is that this answer professes and assumes to answer the entire cause of action. It is not relied on as a partial but as a complete defence, and we have

§ 609. This rule seems to be well established, but it is certainly one which may often work injustice. It is a remnant of the old system, and does not harmonize with the central design of the new, which is to elicit the truth and to decide controversies upon all the actual facts. When the defendant has set up a defence as if to the entire cause of action, which is, however, only partial, and when, if described as partial, it would have been perfectly regular, the plaintiff could not be prejudiced by allowing it to stand for what it is worth as a partial defence. He knows that it is, in fact, partial, *for the very objection assumes that knowledge*. If accurately named, he would be obliged to meet and answer it on the trial; and he would only be compelled to make the same preparation if it were suffered to remain on the record, and to fulfil its intended purpose. In short, the plaintiff could not be misled by such a proceeding; and to strike out the pleading altogether would, if its allegations were true, be depriving the defendant of certain relief to which he was in justice entitled. I repeat, the rule is nothing but a remnant of the ancient technicality, the old devotion to external forms of logical precision which marked the common-law procedure, and which made it any thing but a *practical* means of eliciting and applying the truth in judicial controversies.

SECTION THIRD.

THE DEFENCE OF DENIAL.

§ 610. The various species of denial provided for in the codes are "general" or "specific," and positive or denial of "knowledge or information of the matter sufficient to form a belief." In most of the codes, it is expressly permitted that the denials

seen that for this purpose it is insufficient. Now, under the old system, when a plea professed in its commencement to answer the whole cause of action, and afterwards answered only a part, the whole plea was bad. This rule was elementary; and, upon general principles, we do not see why it is not applicable to pleadings under the code. If a party has a partial defence to an action, he should set it up, and rely on it as such, and not as a complete and entire defence." See also, to the same

effect, *Adkins v. Adkins*, 48 Ind. 12, 17; *Allen v. Randolph*, 48 Ind. 496; *Alvoed v. Essner*, 45 Ind. 166; *Curran v. Curran*, 40 Ind. 478; *Jackson v. Fosbender*, 45 Ind. 305; *Beeson v. Howard*, 44 Ind. 413, 416; *Gulick v. Connely*, 42 Ind. 134, 136. But this rule does not extend to an answer simply pleading a set-off less than the plaintiff's demand, since a set-off is not strictly a defence; *Mullendore v. Scott*, 45 Ind. 113; *Dodge v. Dunham*, 41 Ind. 186.

may be either "general" or "specific." In a few, no provision is in terms made for the general denial, and only those that are "specific" or "special" are mentioned. In one or two, the language simply speaks of "a denial."¹ According to a large majority of the codes, the denial, whether general or specific, may be either positive, or a denial of "knowledge or information thereof sufficient to form a belief;" but in a very few of them the latter form is omitted. The defendant is universally allowed to deny only such allegations of the complaint or petition as he controverts, and this permission is usually given whether he employs the "general" or the "specific" form of denial; but in the latest revision of the Iowa Code (1873), it is said with more accuracy that the general denial must be "of *each* allegation of the petition," while the specific denial is to be "of each allegation of the petition controverted by him."

§ 611. In actual practice, the "general denial," wherever permitted, is only employed when the defendant desires to put the whole complaint or petition in issue, and "specific" denials when he wishes to take issue merely with certain allegations thereof. It is very plain, that in the former case the "general denial," in its brief and comprehensive form, is as efficacious as a particular traverse of each averment separately. Nothing is gained by filling the record with specific denials, when one sweeping denial of the entire pleading will answer the same purpose and admit the same proofs. I shall distribute the subject-matter of this section under the following heads, assuming in the first instance, for convenience of the discussion, that the denial is "positive:" I. The form of the "general denial," and of the "specific denials;" II. The nature of "specific denials," and

¹ In Minnesota, although the code is silent respecting the general denial, and speaks only of "a denial of each allegation," it is settled by repeated decisions that the ordinary form of the general denial is a compliance with the statute, and is entirely proper: hence the general denial is in constant use in that State; and such, I believe, is the practice in most of the States. *Leyde v. Martin*, 16 Minn. 38; *Becker v. Sweetzer*, 15 Minn. 427, 484; *Kingsley v. Gilman*, 12 Minn. 515, 517; *Bond v. Corbet*, 2 Minn. 248; *Caldwell v. Bruggeman*, 4 Minn. 270; *Starbuck v. Dunklee*, 10 Minn. 173; *Montour*

v. Purdy, 11 Minn. 401. On the other hand, in North Carolina, notwithstanding the language of the code, which is exactly the same as that in New York, expressly authorizes the general denial, the general denial in the ordinary form, as used in other States, is held to be a nullity, and an answer containing it will be struck out as sham: an altogether different construction is placed upon the language of the statute from that given in any other State. *Schehan v. Malone*, 71 N. C. 440, 448; *Flack v. Dawson*, 69 N. C. 42; *Woody v. Jordan*, 69 N. C. 189, 196.

what issues they raise ; III. Allegations admitted by omitting to deny ; IV. Denials in the form of negatives pregnant ; V. Argumentative denials, and specific defences equivalent to the general denial ; VI. General denial of all allegations not otherwise admitted or explained ; VII. What allegations must be denied, — issuable facts, and not conclusions of law ; VIII. Denials of information or belief, when proper, and their effect ; IX. What can be proved under denials either general or specific ; X. Some special statutory rules in reference to denials.

§ 612. The discussion which follows, and the practical rules deduced therefrom, are based in the first place upon the assumption that the denials, whether general or specific, are *positive* in their nature. The conclusions which are reached apply, however, with equal force and effect, to those cases in which the denials are of information or belief. The only object of the latter form is, that the defendant may be enabled to put the plaintiff's allegations in issue when he is obliged to verify his answer, and cannot do so from his own personal knowledge : the effect and efficacy of the traverse are not diminished nor in any manner altered by the use of this method when it is properly employed.

I. *The External form of Denials, General or Specific.*

§ 613. Under the common-law system there were several distinct species of the "general issue" and of particular traverses, each appropriate to and only to be used in some one of the different forms of action, or to put in issue certain classes of allegations ; but all these have been abolished in the reformed procedure. One form of the general denial is sufficient for all actions and for all issues ; and although it may undergo slight and unimportant variations, it is substantially the same in all the States, and in the hands of all members of the bar. The material averment, modified doubtless in its phraseology, is, that the defendant "denies each and every allegation of the complaint or petition." The form in common use is, "The defendant, for answer to the complaint herein, denies each and every allegation thereof."¹ It is of course impossible to describe the forms of any

¹ This form is slightly varied in the standard text-books upon pleading, and in the actual practice of the bar : but this is entirely sufficient ; any additional matter would be superfluous.

specific denial. From its very name and nature, it is the special traverse of some particular averment found in the plaintiff's pleading, and must therefore depend to a very great degree upon the matter and shape of the statement which is thus controverted. How far it should merely follow and negative the exact language of the allegation to which it is directed, will be considered under the subsequent head of the section which treats of denials in the form of a negative pregnant. It will there be shown that such an exact adherence to the text of the adverse averment may be dangerous, as the result may be an admission of the substantial fact intended to be put in issue.

II. *The Nature and Object of Specific Denials.*

§ 614. The object of all denials is to put in issue the allegations of the complaint or petition. As will be shown hereafter under the head of the proofs which may be admitted in support of a simple denial, it is only the *issuable facts* which need to be controverted, and which are in fact controverted, by the defendant's traverse. It frequently, and indeed generally, happens that the cause of action depends upon the existence of a succession or group of facts. Each of these must be established in order to make out the right of action, and all are therefore "issuable facts." In addition thereto, the plaintiff's pleading will often contain other averments which must be stated, but which need not be proved as stated, among which are those of time, place, number, quantity, value, and the like. Finally, it happens too frequently, that besides the statements of these strictly "issuable facts," which are all that the pleading should comprise, the plaintiff has unnecessarily, and in a certain sense improperly, introduced averments of matters which are really the details of evidence from which the existence of the "issuable facts" is to be inferred by the jury or the court. It is not always easy to distinguish in a complaint or petition between the main conclusions of fact, — the issuable or material facts, — all and each of which are indispensable to create the right of action, and the mere details of evidence which must be proved at the trial in order to establish the essential "issuable facts;" and the careless mode of pleading which has grown up in some States, contrary to the true intent and spirit of the reformed procedure, results chiefly from a disregard of the distinction here mentioned, and is shown

in a confused admixture of evidentiary matter, allegations of substantial facts, and conclusions of law, in the same complaint or petition.

§ 615. When the series of issuable facts which would make up the plaintiff's cause of action are properly stated, it will frequently happen, especially if the pleadings are verified, that the defendant cannot deny them all. Some of them may be true, so that an issue upon them is impossible. But if one or more are not true, and can therefore be controverted, and if the existence of all is indispensable to the right of action, a denial of that particular allegation, or of those particular allegations, may be as complete a defence as though the entire series was traversed and disproved. The forming such an issue upon some one or more particular averments out of the whole number contained in the complaint or petition is the legitimate and proper office of the "special denial," and by its use in this manner an ample defence may be placed upon the record. A "specific denial" is therefore a denial of some particular averment in the complaint or petition; and whether or not it alone raises a material issue, and constitutes a sufficient defence, depends upon the question, whether the particular allegation thus traversed is in itself essential to the maintenance of the cause of action. There may, of course, be several such specific denials inserted in the same answer, directed to distinct averments of the adverse pleading, and together constituting a defence differing from that raised by the "general denial" in the single circumstance, that by the latter *all* the issuable facts are put in issue, while by the former only a portion of them are controverted. As each specific denial is aimed at a particular averment, it should expressly and unmistakably point out the statement of fact intended to be traversed; it should deny that allegation fully and explicitly, so that the plaintiff may be forced to establish it by proofs; and it should leave no doubt as to the matter at which it is aimed, and as to the issue intended to be made.

§ 616. The object of this kind of denial, and the rules which govern its use, were accurately stated in a recent case: "To determine whether an allegation has been properly denied or not, we must examine the answer to the particular allegation which it is designed to controvert. If, taken by itself, an issue is fairly made, and there is no admission inconsistent with the answer,

the denial is sufficient. . . . Each denial must be regarded as applying to the specific allegation it purports to answer, and not as forming part of an answer to some other specific and entirely independent allegation."¹ A single case, an abstract of which is placed in the foot-note, will serve to illustrate the object and effect of the specific denial.² As the defendant in this action could not controvert his signature to the instrument, the pleader evidently supposed that it was impossible for him to deny the execution in the answer since the pleadings were verified; he therefore traversed but one issuable fact,—the delivery. Success in this issue was as complete a defence as though the execution had also been disproved. It is plain, however, that the "general denial" might have been pleaded; for, if the defence was true, there had never been any execution or delivery of the note in the legal sense of these terms.³

III. *Allegations admitted by a Failure to Deny.*

§ 617. All the codes provide that material allegations in the complaint or petition, not controverted by a general or specific

¹ *Racouillat v. Rene*, 82 Cal. 450, 458, 455, per Sawyer J.; and see *Allis v. Leonard*, 46 N. Y. 688.

² *Sawyer v. Warner*, 15 Barb. 282, 285. The complaint, in an action upon a promissory note, alleged the making of the note by the defendant, the delivery thereof by the defendant to the plaintiff, the present ownership of the plaintiff, non-payment, and indebtedness of the defendant thereon in the amount specified therein. The answer merely denied that the defendant ever "gave" the said note or any other note to the plaintiff, and denied all indebtedness. On the trial, the plaintiff proved the signature of the note to be in the defendant's handwriting, and his own possession. The body of the instrument was in the plaintiff's handwriting. The defendant then proved facts tending to show that he never executed the instrument as a note, and never delivered it to the plaintiff, but that he had some time written and left his name on a blank paper, and the plaintiff had fraudulently added the body of the note over such signature. The jury rendered a verdict for the defendant; and, upon the

plaintiff's appeal, the court said: "The allegation in the answer that the defendant never gave the note to the plaintiff is a denial of the allegation in the complaint that the defendant made the note, so far as making includes delivery; and also of the further allegation, that the defendant delivered the note to the plaintiff. The question to be tried on these allegations was, whether or not the note was delivered to the plaintiff as alleged by him. . . . The plaintiff made out this fact *prima facie*. . . . But the defendant was at liberty, in support of his side of the issues, independent of other modes, to prove facts inducing a contrary presumption, and, in that way, overcome the presumption from the plaintiff's proof; and he was entitled to give in evidence any facts calculated to satisfy the jury by fair and direct inference that the note was never delivered by him."

³ See *Higgins v. Germaine*, 1 Montana, 280; also *Van Dyke v. Maguire*, 57 N. Y. 429 (denial of value alone in action for labor and materials); *Dunning v. Rumbaugh*, 86 Iowa, 566, 568 (denial of execution only in an action on a note).

denial, are admitted to be true for the purposes of the action. It follows that the plaintiff need not prove any material allegations so conceded to be true; evidence in contradiction of them cannot be received; and a finding of fact in opposition to such admission will be disregarded or set aside on appeal.¹ The important question is, What facts or allegations are "material"? The answer has already been indicated. The allegations of the "issuable facts" mentioned in the last preceding subdivision, and described at large in Chapter Third, are the material allegations, which are admitted by a neglect to deny them. It follows that the two other classes of averments found in complaints and petitions, viz., those of time, place, quantity, value, amount, and the like, and those of unnecessary evidentiary matter, or of legal conclusions, are not thus admitted. They need not be denied, and are not the subject-matter of proper issues upon the pleadings. The allegations of time, place, amount, value, amount of damages, and the like, are not, except in very special cases, matters of substance so as to require a denial; and they may, in general, be contradicted or modified without a denial. Thus, in actions of trover, trespass, or replevin, it was not necessary to traverse the averments as to the value of the chattels, and as to the amount of damages; and the same rule prevails in all actions brought for a similar purpose under the new system.² "The defendant is not bound to answer all matters of evidence which the plaintiff chooses to allege. The office of the complaint is to aver the material, issuable facts which constitute the cause of action, and not the evidence to prove these facts. It is only material allegations that are admitted when not specifically controverted by the answer."³ "The scope of the general denial is merely to put in issue such averments of the complaint as the plaintiff is bound to prove in order to maintain his action: it does not controvert redundant allegations."⁴

¹ *Morton v. Waring's Heirs*, 18 B. per Sawyer J.; *Siter v. Jewett*, 33 Cal. Mon. 72, 82; *Bradbury v. Cronise*, 46 Cal. 287; *Howard v. Throckmorton*, 48 Cal. 482, 490. See also ch. 8, sect. 4.

² *Jenkins v. Steanka*, 19 Wisc. 126.

³ *Racouillat v. Rene*, 82 Cal. 450, 455,

⁴ *Adams Ex. Co. v. Darnell*, 31 Ind. 20, 22, per Frazer J.; *Baker v. Kistler*, 13 Ind. 68. For an example of immaterial denial, see *Newman v. Springfield F. and M. Ins. Co.*, 17 Minn. 123, 133.

IV. *Denials in the Form of a Negative Pregnant.*

§ 618. Such a denial is one pregnant with an admission of the substantial fact which is apparently controverted ; or, in other words, one which, although in the form of a traverse, really admits the important fact contained in the allegation. As an illustration : If the averment was that the defendant on the first day of January made a note, and the answer should deny that the defendant on the first day of January made the note, this might be construed as an admission that he made the note on some other day ; or if the complaint stated that "the defendant wrongfully and forcibly entered the plaintiff's close," and the answer should deny "that the defendant wrongfully and forcibly entered the plaintiff's close," the fact of entering the close might be considered as admitted. Of course, a denial to produce this result must of necessity be specific ; for the general denial of "each and every allegation in the complaint" cannot be pregnant with any admission. Denials in the form of a negative pregnant arise (1) when the allegation is of a single fact with some qualifying or modifying circumstance, and the traverse is *in ipsa verbis*, using exactly the same language, and no more ; and (2) when the allegation is of several distinct and separate facts or occurrences connected by the copulative conjunction, and the traverse is *in ipsis verbis* of the same facts and occurrences also connected by the same conjunction. In most of the reported decisions, the courts have held such forms of denial to be insufficient, and have declared that they raised no issues, treating the statements of the complaint or petition as actually admitted. This was the universal rule under the old system ; and as it was not based upon any merely technical reasons, or doctrine of pleading, the same rule is properly followed under the codes.¹

§ 619. A few examples will illustrate the nature of these denials, and the decisions of the courts thereon. In an action upon a promissory note against the indorser, the answer, copying the exact language of the complaint, said : "That whether or not, upon the maturity of the said note, the same was duly presented to the makers for payment, and payment thereof demanded and

¹ See *Pottgieser v. Dorn*, 16 Minn. 204, 209 ; *Lynd v. Pickett*, 7 Minn. 184, 194 ; *Dean v. Leonard*, 9 Minn. 190.

refused, and thereupon said note was duly protested for non-payment and notice of such presentment, refusal, and protest, given to the defendant, the defendant has no knowledge or information sufficient to form a belief." This denial was pronounced bad as a negative pregnant, and was disregarded.¹ In an action upon a fire policy against the insurers, the defendants moved for leave to file an amended answer. In denying this motion, the court said: "The denials are all liable to the objection that they are negatives pregnant. The complaint avers that on a particular day the property was all destroyed by fire. The answer denies this in the very words of the complaint. Such a denial is a negative pregnant with the admission that it may have been destroyed on some other day, or that a part may have been destroyed on the day named. Such denials have always been held insufficient."² A complaint alleging that "the proofs of loss were filed with the secretary of the defendant on the 31st of March, 1866," the denial was, that the proofs were filed "*as alleged in the complaint.*" This was declared to be pregnant with the admission that they were filed on another day within the time required.³

§ 620. When a verified complaint contained many distinct allegations conjunctively stated, and the answer consisted of denials of these averments *in ipso verbis* also conjunctively stated, following in this manner the exact language of the entire complaint, the court ordered a judgment for the plaintiff on the pleadings, saying: "This mode of answering is in violation of the principles of common-law pleading, and not less so of the statute which provides that the defendant's answer to a verified complaint shall contain a specific denial of each allegation controverted, or a denial thereof according to the defendant's information and belief."⁴ The complaint in an action to recover possession of chattels alleged that "defendant unlawfully and

¹ Young v. Catlett, 6 Duer, 487, 448, per Woodruff J.

² Baker v. Bailey, 16 Barb. 54; Salinger v. Lusk, 7 How. Pr. 480. See Bradbury v. Cronise, 46 Cal. 287, where, the complaint alleging that the plaintiff did certain work and labor at the request of the defendant, an answer denying that he performed such work and labor at the request of the defendant admitted the performance of the services by the plaintiff.

³ Schaetzel v. Germantown, &c. Ins. Co., 22 Wisc. 412. See also Robbins v. Lincoln, 12 Wisc. 1. In McMurphy v. Walker, 20 Minn. 382, 384, the complaint on a note alleging that it was delivered on the 10th of September, 1868, an answer stating that it "was not delivered until after Sept. 10, 1868," was held to raise no issue.

⁴ Fish v. Redington, 31 Cal. 185, 194.

wrongfully seized and took said property into his possession from said plaintiff;" and the answer denied "that he wrongfully and unlawfully seized and took said property," &c. This answer, it was held, admitted the taking.¹ It is the settled rule in California that conjunctive denials, in the very language of conjunctive allegations, raise no issues.²

§ 621. In an action to foreclose a mortgage given to secure a bond, the complaint alleged the execution of the bond for \$4,000, with a provision in it, that, if default should be made in the payment of interest for thirty days, the whole principal sum should become due at the option of the plaintiff; and set out the mortgage, averring that it contained the same provision, that interest had been due more than thirty days, and that plaintiff made his election to regard the whole principal as due. The defendant in his answer admitted the execution of the bond and mortgage, "but he denies that the said bond and mortgage contained any condition or clause whereby, in case of a default in payment of interest for the space of thirty days, the principal sum was to become due and payable immediately, as alleged in said complaint, *as by reference to said mortgage will more fully appear.*" This defence was struck out as frivolous, the court saying: "This is a denial that both of the instruments contained the clause in question. It is not a denial that one of them contained it. The bond and the mortgage together constituted but one instrument. The latter refers to the former as affording particular evidence of the terms of payment. Such reference incorporates into the mortgage all the terms and conditions of the bond. The only denial was of their joint effect. This was an admission as to the bond." The defence, therefore, did not put in issue the allegation of the complaint, that the whole amount was due.³

§ 622. There is not, however, an absolute unanimity among the decided cases. In some instances the courts, avowedly rejecting the common-law rule of strict construction, and apply-

¹ Woodworth v. Knowlton, 22 Cal. 164. See also Feely v. Shirley, 43 Cal. 369; Harris v. Shontz, 1 Mont. 212, 216; Toombs v. Hornbuckle, 1 Mont. 286.

² Blankman v. Vallejo, 15 Cal. 638; Kuhlman v. Sedgwick, 17 Cal. 123; Caulfield v. Sanders, 17 Cal. 569; Landers v. Bolton, 26 Cal. 393; Busenius v. Coffee, 14 Cal. 91.

³ Kay v. Whittaker, 44 N. Y. 565, 571, per Hunt J. The court certainly applied in this case the common-law doctrine, that the allegations of a pleading must be construed most strictly against the pleader. The decision goes much farther than any of the others cited above upon this subject.

ing the requirement of the codes that pleadings must be liberally construed with a view to substantial justice, have held that such denials did raise an issue, although their character as negatives pregnant was fully acknowledged. It will be seen from the decisions to be cited, that no line of distinction can be drawn which separates them from those which precede, and reconciles their conflicting results: different courts have simply pronounced in an opposite manner upon substantially the same facts or circumstances. A petition stated the cause of action in the following manner: "Plaintiff claims of defendant sixty-four dollars, and for a cause of action states that on the 15th day of October, 1867, the defendant set fire to prairie land, and allowed the fire to escape from his control, whereby said fire spread to and consumed sixteen tons of hay, the property of the plaintiff, to his damage," &c. The answer denied "that defendant did on the 15th day of October, 1867, set fire to prairie land by which the hay of the plaintiff was consumed." The Supreme Court of Iowa, in pronouncing judgment, said that defendant's denial "was perfectly consistent with his doing the act on the 14th or the 16th, or on any other day than the 15th." Yet, in view of the rule of liberal construction imposed upon the judges by the code, it held that this answer, though conceded to be a negative pregnant, was not a nullity, but raised an issue.¹ The Supreme Court of Missouri applied a like lenient method in an action upon a bill of exchange executed by the National Insurance Company. The petition alleged that the company, "by its draft in writing signed by its secretary," made the obligation; and the answer in turn denied "that the company, by its draft in writing signed by its secretary," made the obligation. This answer, it was held, raised an issue. Construing it freely and favorably to the pleader, it could not be treated as a nullity, although its character as a negative pregnant was undoubted.²

§ 623. If the requirements of the codes as to the mode of forming issues by specific denials are not to be a dead letter, the doctrine supported by the series of decisions first above cited is clearly correct, and the practical rule drawn from them is in

¹ Doolittle v. Greene, 82 Iowa, 123, 124.

² First Nat. Bank v. Hogan, 47 Mo. 472. See also Ells v. Pacific R. R., 55 Mo. 278, 286; and Wall v. Buffalo Water

Co., 18 N. Y. 119, in which it was held that the answer should have been corrected on motion, and that, in the absence of such motion, an issue was raised.

every respect superior to the slipshod method of treatment adopted by the other class of cases. To say the least, a denial in the form of a negative pregnant is such a glaring violation of logical and legal principles, that it exhibits on the part of the pleader either the ignorance which does not comprehend the nature of an issue, or the astute cunning which is able to conceal the want of a defence under the appearance of a direct answer. In either instance, it should be condemned by the courts.

V. Argumentative Denials, and Specific Defences equivalent to the General Denial.

§ 624. It has been shown that all defences are either (1) denials of all, some, or one of the plaintiff's allegations; or (2) affirmative new matter which assumes that the allegations of the complaint or petition cannot be disproved, but at the same time establishes other facts which defeat the right of action. The general denial, we have seen, is a brief and comprehensive formula, denying "each and every allegation of the complaint or petition;" and the special denial is based upon and negatives the single averment against which it is directed. It is utterly impossible, therefore, that a denial, either general or special, if properly framed, should contain any affirmative matter, any allegation of facts in a positive and direct manner as though they constituted new matter and a defence by way of confession and avoidance. A defence, consisting in the narrative of facts, stated under the form of "new matter," which were not, however, new matter, but could all be properly proved under a denial, would be a violation of the true theory of pleading, and of the classification and description of defences contained in all the codes.

§ 625. It sometimes happens that the pleader, either mistaking the nature of the facts which will be proved by the defendant, and thinking them to be new matter when in truth they are only the evidence which can be offered in support of a denial, or supposing for some reason that his case will be strengthened by spreading all these details upon the record, sets up a defence either alone or joined with others which is in form "new matter." It consists of affirmative allegations, stated as though they confessed and avoided the plaintiff's cause of action: and yet the facts thus averred are not new matter; they are simply the

evidence which can be offered in support of a denial. The defence altogether is therefore the same as a denial: if it goes to the whole complaint or petition, it is equivalent to the general denial; if it goes to some particular allegation or allegations, it is equivalent to one or more specific denials. It is plain that the defendant has gained nothing by such a mode of pleading; he has not added any thing to his case; he has not stated a fact which he could not have proved under a simple answer of denial. On the contrary, in limiting the scope of his proofs at the trial to the particular matter which he has pleaded, he may have weakened his defence by shutting out the consideration of other facts which he could have given in evidence under a proper denial. At all events, he has unnecessarily disclosed his case to the adverse party.

§ 626. This is clearly an unpractical as well as unscientific mode of pleading. Such a defence is an "argumentative denial." The same fault which I have thus indicated, sometimes existed under the old procedure. A plea in the form of a special plea by way of confession and avoidance, which contained no matter of that character, but only matter which could be proved under a traverse, and which was therefore equivalent to a traverse,—to the general issue perhaps,—was generally bad on demurrer. The objection was, not that the facts thus set up constituted no defence at all,—for the very assumption was that they did constitute a defence by way of traverse,—but the external forms of the system were considered to be of such importance, and this faulty pleading so completely violated them all, that it was held to be worthless for any purpose.

§ 627. The same rules of order and classification are violated by such defences at the present day; but as the new procedure looks rather to the substance than to the form, and as a demurrer to the answer is only allowed on the ground of insufficiency,—that is, when the facts stated do not constitute *any* defence,—the pleading which I have described as an "argumentative denial" is not considered bad on demurrer. The plaintiff's remedy is by motion to make the defence more certain and definite, and to strike out redundant and superfluous matter. If such motion was more frequently resorted to, and was favored by the courts, it would soon produce the effect of working a marked improvement in pleadings. It is not merely a scientific blemish, but a great practical evil, to have the record incumbered by a mass of

unnecessary allegations, and matters purely evidentiary, when a short and comprehensive denial would the better subserve the rights of the parties, and more clearly bring out and exhibit the issues designed to be raised by the answer.

§ 628. An example or two from among the decided cases will be sufficient to illustrate the kind of defence which is equivalent to the denial and the rulings of the courts thereon. An action was brought by the University of Vincennes against one Judah to recover certain bonds alleged to be the property of the institution, which the defendant had converted to his own use. His answer set up, that the university was indebted to him in a large amount for professional services, and that the board of trustees had passed a resolution allowing him to retain and have these bonds as compensation for his services and in settlement of his claim. The reply, instead of denying this answer, averred that Judah had been secretary of the board of trustees; that he fraudulently entered this resolution in the books of record of the university; that no such resolution was ever passed; and it set out the resolution which was actually passed, and which was very different from that alleged in the answer. To the paragraph of the reply containing this matter the defendant demurred; the demurrer was overruled, and he appealed. In disposing of the question thus raised, the court said: "Now, this reply is simply a denial of so much of the answer as alleges the adoption of the resolution, or, in other words, the making the contract by the trustees. It is argumentative, and it needlessly explains how a resolution never made by the trustees comes to be found on their records. This is surplusage. But neither argumentativeness nor surplusage justifies a demurrer under our system of pleading. There was, therefore, no error in overruling the appellant's demurrer to the second paragraph of the reply."¹ It is plain that a general denial of this answer would have admitted in evidence all the facts specially pleaded in the reply under the form of new matter; and the reply was, in fact, nothing more than a denial.

§ 629. When the answer contains two or more defences, viz., 1st, a general denial, and, 2d, a special defence in the form of new matter, but in fact equivalent to the general denial, and a demurrer to the latter has been sustained, no material error is thus

¹ Judah v. University of Vincennes, 28 Ind. 272, 277. See also Clink v. Thurston, 47 Cal. 21, 29.

committed, and the judgment will not be reversed ; for the same facts which were averred in the special defence could be fully proved under the general denial, and the defendant's whole case would thus be available under the issue which remained upon the record.¹ In an action for goods sold and delivered, the answer in each of three separate defences set up the same facts with immaterial variations: viz., that the goods were sold to the defendant's wife without his knowledge or consent ; that she had at the time wrongfully abandoned him, and was living apart from him, and for these reasons he was not liable for the price. A demurrer to these defences having been sustained in the court below, the Supreme Court on appeal held that they were all argumentative general denials: "their effect was simply to aver that the goods were not sold to the defendant, and all the matters relied upon could have been proved under a general denial." It was further said, that a motion was the proper remedy to correct such faulty pleading, and the demurrer was irregular: but the irregularity in this instance was merely technical, and the error committed was immaterial, and had not prejudiced any rights of the defendant; for, as he had pleaded the general denial in addition to the special defence mentioned, his entire case was provable under that part of the answer.²

§ 630. This leads me to the second branch of the present subdivision; namely, the combination of the general denial with other defences equivalent thereto in the same answer. The argumentative denial described above is frequently in practice used in connection with the general denial inserted in the same answer. It would seem as though the pleader, after he had written the brief general denial, could not be satisfied with its efficacy, and considered it necessary to add in separate divisions of the answer a further statement of the very facts which he knew would constitute the defence, and which could all be proven under the general denial. This mode of pleading is faulty in the extreme ; it has not a single reason in its favor, not an excuse for its existence ; it overloads the record with superfluous matter, and produces nothing but confusion and uncertainty. In a few States the courts have struggled to correct this vicious departure from

¹ *Chicago, &c. R. R. v. West*, 37 Ind. 211, 215; *Waggoner v. Liston*, 37 Ind. 357.

² *Day v. Wamsley*, 33 Ind. 145.

the true theory of pleading, and have enforced the rules and remedies which the codes amply provide. It is unnecessary to argue that this species of answer is in direct conflict with the plainest principles and the most express requirements of the codes. Those statutes permit only "denials" and statements of "new matter," that is, matter which is truly a *confession and avoidance*; they do not authorize averments of matter which is not *new*, but which is simply a detail of evidence going in support of a *denial*. While this reformed system constructed by the codes is perfect in its scientific character, — far surpassing in that respect the loose notions introduced by the common-law courts in relation to the function of the ordinary "general issues" of the old procedure, — it is at the same time in the highest degree practical. If the advantages which ought to be derived from the great reform are to be obtained, it is clearly the duty of all the courts to insist upon a return to the simple methods which the codes so clearly prescribe, concerning which, indeed, they do not leave the slightest doubt or uncertainty.

§ 631. In Indiana, a practice has become settled, which might well be borrowed by the courts of all the other States. I know of no single rule of procedure, which, if uniformly adopted and rigidly enforced, would work out a happier result in bringing the forms and modes of pleading back to the simple and scientific theory embodied in the codes, than the rule which prevails in Indiana, and which I shall now explain and illustrate. I dwell on it at some length, not because it can now be regarded as part of the universal practice throughout the States in which the new system has been established, but because it ought to become so; and I hope, that, by introducing it to the attention of the bench and bar in other commonwealths, its merits may be at once recognized, and its methods followed.

§ 632. When the answer contains the general denial, and, in addition thereto, a separate defence or separate defences equivalent to the general denial, — that is, mere argumentative denials as above described, — such additional defences, it is settled, are irregular, and will be overruled and expunged from the record. The remedy is not by demurrer, for the reasons already given, but by motion to strike out as redundant and superfluous. If, however, a plaintiff, instead of moving to strike out, should demur to the vicious defences, and that demurrer should happen to be sustained

by the lower court, no material error would have been committed, for the same result would have been reached which would be attained by a motion; the record would be cleansed of its redundancy, and the general denial would remain, under which all the facts constituting the defence, and which had been set forth at large in the rejected paragraphs, could be given in evidence at the trial. This practice, I say, is thoroughly settled in Indiana; and the result is a system of pleading in that State which far surpasses, in its brevity and its adherence to the spirit of the codes, that prevailing in any other State. The cases collected in the notes illustrate many forms of pleading to which the rule has been applied, and exhibit its practical workings in a very complete manner.¹ The same doctrine and practice have been occasionally followed in other States.² This subject will be again referred to in the subsequent section which deals with the union of defences. It is very plain that the faulty method described and criticised proceeds in a very great measure from an uncertainty in the mind of the pleader as to the matter which may be given in evidence under the "general denial:" whatever, then, will remove that uncertainty, will aid in producing a reform in the manner of stating defences in the answer.

VI. *General Denials of all Allegations not otherwise admitted or referred to.*

§ 633. A practice has recently grown up of framing an answer in the following manner: To admit such of the plaintiff's averments, if any, as the facts of the case require; to deny others wholly or partially; to explain and modify others if thought

¹ *Adams Ex. Co. v. Darnell*, 31 Ind. 20; 175; *Widener v. State*, 45 Ind. 244; *Indianapolis, &c. R. R. v. Rutherford*, 29 Ind. 82; *Jeffersonville, &c. R. R. v. Dunlap*, 29 Ind. 426; *Rhode v. Green*, 26 Ind. 88; *Boudurant v. Bladen*, 19 Ind. 160; *Butler v. Edgerton*, 15 Ind. 15; *Westcott v. Brown*, 18 Ind. 83; *Garrison v. Clark*, 11 Ind. 369; *Cain v. Hunt*, 41 Ind. 466, 471; *Ferguson v. Ramsey*, 41 Ind. 511, 513; *Chicago, &c. R. R. v. West*, 37 Ind. 211; *Urton v. State*, 37 Ind. 389; *Port v. Russell*, 36 Ind. 60; *Day v. Wamsley*, 33 Ind. 145; *Allen v. Randolph*, 48 Ind. 496; *Trogden v. Deckard*, 45 Ind. 572; *Wolf v. Schofield*, 38 Ind.

Sparks v. Heritage, 45 Ind. 66; *Lewis v. Edwards*, 44 Ind. 333; *Ohio and Miss. R. R. v. Hemberger*, 43 Ind. 462, 464; *Wilson v. Root*, 43 Ind. 486, 493.

² *Rost v. Harris*, 12 Abb. Pr. 446, per *Bosworth J.*; *Radde v. Ruckgaber*, 3 Duer, 684; *Simpson v. McArthur*, 16 Abb. Pr. 302 (n.), per *Brady J.*; *Bruck v. Tucker*, 42 Cal. 346. It is held in Florida that the court may strike out such a special defence or not as it pleases, and neither ruling will be error. *Davis v. Shuler*, 14 Flor. 488, 445.

necessary ; in short, to unite in one answer or division thereof a mass of special admissions, denials, explanations, and affirmative statements, and to conclude the whole with a sweeping clause somewhat in this form : " As to each and every other allegation in said complaint not herein expressly admitted or denied or mentioned, the defendant hereby denies the same ; " or, " And the defendant denies each and every other allegation in said complaint not hereinbefore expressly admitted or denied or mentioned." Although a somewhat similar mode of putting in issue the averments of a bill in equity was occasionally resorted to by chancery pleaders under the former system, the codes give no countenance to, nor authority for, such a mongrel form of answer. The true spirit and intent of the theory introduced by the reformed procedure plainly demand certainty, precision, and definiteness in the allegations of both parties, and especially in the denials by which the defendant places on the record the exact issues intended to be tried. In this respect the new method was to be a complete departure from the vagueness and uncertainty resulting from the broad effect given to the general issues in "assumpsit," "debt," and "trover" by the common-law courts, and also from the loose and incomplete manner of presenting the issues which necessarily characterized the answer in chancery. This design of the codes would, however, be utterly defeated if the vicious style of defence thus described should become common ; and the courts, it is submitted, ought to have pronounced most emphatically against it when it first made its appearance.

§ 634. The codes require either a general denial, or specific denials, or defences in confession and avoidance ; and also that each defence must be separately stated, so that the issue raised by it may be perceived at once. The "general denial" is evidently intended to be an answer to the entire complaint or petition, — to negative all its averments. The design of the legislature and the understanding of the bar upon this point were shown by the immediate adoption of the form in use throughout all the States. The code of Iowa, revised in 1873, expressly enacts that the general denial is interposed to the whole petition ; and this provision is plainly a statutory construction of the universally prevailing doctrine : a specific denial, on the other hand, must be addressed to some single, particular allegation, and must distinctly indicate the portion intended to be controverted by it. I am of

opinion that each specific denial ought to be a single and separate defence by itself, so that, if the issue upon it should be decided in favor of the defendant, the cause of action would be defeated. In this respect, I think, the specific denials of the codes were intended to be analogous to the special traverses provided for by the English judges in their new rules of pleading adopted in 1834. Certain it is that the codes do not, by any stretch of their language, contemplate an answer consisting of a general denial directed to a part only of the complaint or petition, and connected with other admissions, partial denials, and explanations.

§ 635. Again: this form of answer makes it extremely difficult, and often impossible, to determine what allegations are denied, and what are passed by in silence, and therefore admitted. If the complaint or petition contains numerous averments, and the answer is such a mass of express admissions, partial explanations, and statements of matter which is merely evidentiary, and concludes with the formula above quoted, we have all the evils which can result from the most vicious system or no-system that can possibly be conceived. The object of pleading is to ascertain and present the issues of fact between the litigants, so that they can be readily perceived and decided by the court and jury. The special boast of the common-law methods was, that they brought out these issues singly and clearly. I am confident that the theory of the reformed procedure, when lived up to and accurately followed, will give much better practical results than were ever obtained as a whole from the former system. The kind of answer which I have described violates every principle of this theory, and is a contrivance of ignorance or indolence.

§ 636. Notwithstanding the foregoing considerations, which appear to be such plain and necessary inferences from the language as well as the intent of the codes, the courts of New York and of some other States have given a seeming approval to this most slovenly manner of stating the defence of denial. So far as their decisions have passed upon the subject, they seem either to approve such answers, or at most to hold, that, if improper, the only mode of correction is by a motion to make them more definite and certain; in other words, they are sufficient to raise the intended issues. It cannot be said, however, that the question has been settled by authority, or that this species of denial

has become an established method of pleading wherever the reformed procedure prevails. The few cases which touch upon the matter will now be cited. In an action upon a policy of life insurance, the answer was of the kind mentioned, and concluded as follows: that "the defendant denied each and every allegation of the complaint not therein expressly admitted or denied." The Court of Appeals said of this answer: "It is clear both upon principle and authority, that, under a general or specific denial of any fact which the plaintiff is required to prove to maintain the action, the defendant may give evidence to disprove it."¹ If an answer containing denials of the allegations of the complaint, except as thereafter stated, is rendered indefinite, uncertain, or complicated, the remedy is by motion to make the answer more definite, and not by exclusion of evidence on the trial."² A similar answer, ending with a denial of "each and every allegation of the complaint except as herein admitted or stated," was held by the same court to be good and to raise an issue.³

VII. *Allegations of Issuable Facts, and not Conclusions of Law, should be denied.*

§ 637. The complaint or petition, in addition to the facts from which the right of action arises, sometimes contains the conclusions of law which result from those facts, such as the indebtedness of the defendant, his liability in damages, and the like. It is a fundamental principle of the pleading authorized by the codes, that these averments of fact must be denied, and not merely the legal conclusion therefrom; a traverse of the latter without one of the former is a nullity, and creates no issue. When the issuable facts are denied, a denial of the conclusions of law is unnecessary, but would certainly be harmless. In this respect, the reformed procedure has introduced a new feature into the science of pleading. It is often said, I am aware, by writers of authority even, that, under the common-law methods, the

¹ *Wheeler v. Billings*, 88 N. Y. 263.

² *Greenfield v. Mass. Mut. Life Ins. Co.*, 47 N. Y. 430, 437, per Grover J. An expression in this quotation indicates a certain misconception on the part of the learned judge. A general denial of a fact is something unknown in the system of pleading established by the codes. See

also *Leyde v. Martin*, 16 Minn. 38; *Becker v. Sweetzer*, 15 Minn. 427, 434; *Kingsley v. Gilman*, 12 Minn. 515, 517, 518, which show that this form of denial is fully approved by the Minnesota court.

³ *Youngs v. Kent*, 46 N. Y. 672; and see *Allis v. Leonard*, 46 N. Y. 688.

facts were always, and the legal conclusions were never, to be traversed. But this statement is clearly inaccurate. In some of the most common forms of declaration in constant use, the leading averment was that "the defendant *is indebted*," a mere inference of law; and the general issue might be, "he is not indebted," or "he was never indebted," which was certainly nothing but the denial of a legal conclusion. All this has been swept away by the codes, and every trace of it left in the modern practice is in direct opposition both to the spirit and to the letter of the statute. A denial of indebtedness or of liability, without denying the allegations of fact from which the indebtedness or liability is claimed to have arisen, is a nullity; it raises no issue, and will be held bad on demurrer, as is shown by the subjoined cases: In an action upon a promissory note, the answer admitted the execution of the note, and denied that the defendant owed the debt to the plaintiff. A demurrer to this answer was sustained, the court saying: "This answer under the former mode of pleading would have amounted to a plea of *nil debet*, and would not have been good, as the suit was brought upon a note in writing *having the dignity of a specialty*; and we are of opinion that the answer was not sufficient under the present practice. It was not sufficient to state that defendant did not owe the debt."¹ All the cases, with hardly an exception, are to the same effect: as in an action on a note, an answer saying that "the defendants do not owe and ought not to pay the note, for they do not admit the regular protest thereof and notice," raised no issue;² also where, in an action for goods sold and delivered, the answer "denies that the defendant is indebted to the plaintiff as stated in the petition;"³ and where, in an action on a note, the answer simply denied indebtedness to the plaintiff as claimed in the petition, or in any other sum or amount whatever.⁴

§ 638. The same is true of any other denials of mere inferences or conclusions of law. Thus, in a suit upon a note given to the plaintiff, a married woman, and made expressly payable to

¹ Haggard v. Hay's Administrator, 18 B. Mon. 175.

² Clark v. Finnell, 16 B. Mon. 329, 335.

³ Francis v. Francis, 18 B. Mon. 57; and see Nelson v. Murray, 23 Cal. 338;

Curtis v. Richards, 9 Cal. 33; Wells v. McPike, 21 Cal. 215; Higgins v. Germain, 1 Mont. 230; Skinner v. Clute, 9 Nev. 342.

⁴ Morton v. Coffin, 29 Iowa, 235, 238.

her on its face, a defence that the "note is not her separate property," and a denial that she is the legal owner and holder thereof, were both held nullities, and struck out on motion.¹ The defence, in an action to foreclose a mortgage, "that D. [the mortgagor] was regularly and duly discharged from all his debts, including that to the plaintiff, under proceedings in insolvency," was held not to be new matter requiring a reply, "but only a conclusion of law and not of fact," and not to create an issue.² In an action to recover for injuries caused by the negligence of the defendant, the complaint, after stating the necessary facts showing the negligent omissions, and the consequent destruction of the plaintiff's property, concluded, "to his great damage, to wit, in the sum of \$800." The answer simply denied "that the plaintiff had suffered damage in the sum of \$800." This denial raised no issue.³

§ 639. The converse of the rule illustrated by the foregoing cases is also true. If the answer denies the material facts averred by the plaintiff, or alleges material facts constituting a defence of new matter, it need not deny the plaintiff's conclusions of law, or state any conclusions of law as the inference from the facts which it has pleaded. Thus, in an action upon a contract, the answer alleged all the facts necessary to show that the agreement was illegal as being in restraint of trade; but the illegality was not expressly averred, nor relied upon as a defence by means of any clause drawing such a conclusion from the facts which were stated. The defence, however, was held to be sufficient both in form and substance: the facts constituting it were all pleaded; and that was enough, without adding the legal inferences from them.⁴

VIII. *Denials of Knowledge or Information.*

§ 640. All the denials, either general or specific, to which the rules stated in the foregoing subdivisions apply, may be either positive, or denials of knowledge or information in respect to the

¹ *Frost v. Harford*, 40 Cal. 165, 166; *Felch v. Beaudry*, 40 Cal. 439.

² *Christy v. Dana*, 42 Cal. 174, 178.

³ *Huston v. Twin and City, &c. Turnp. Co.*, 45 Cal. 550; *Higgins v. Wortel*, 18 Cal. 380. In an action to enforce a lien upon defendant's land, an answer which,

without controverting any of the facts alleged, simply denied that the plaintiff had any lien, was held to raise no issue. *Bradbury v. Cronise*, 46 Cal. 287. See, however, *Simmons v. Sisson*, 26 N. Y. 264, 270, 273.

⁴ *Frost v. More*, 40 Cal. 347.

matters alleged by the plaintiff. When the latter mode is adopted, the formula prescribed by the statute should be exactly followed, not because there is any value in the form simply as such, but because in no other manner can the defendant satisfy the demands of the code, and raise a substantial issue,—an issue which is not a subterfuge and pretence. When the denial is positive, the defendant is required to negative directly each and every allegation of the complaint or petition, or the particular ones controverted by him if less than all. If this cannot be done by reason of the defendant's ignorance, and he is therefore permitted to choose the other alternative, he must deny that he has any knowledge or information concerning the matters alleged sufficient to enable him to form a belief respecting them. Any other form must of necessity be evasive. And so the cases all hold; but a single illustration will suffice. The complaint in an action to recover the price of gas furnished to a city being verified, the answer was as follows: "And this defendant says that the defendant has no knowledge or information in relation to the allegations of the second count of the said complaint, and *therefore* denies the same." On the trial, the averments of the second count were treated by the court as not denied, and as therefore admitted to be true; and this ruling was sustained on appeal. The answer was held to be a nullity: the only denials permitted, it was said, are those positive in form, and those which deny any knowledge or information sufficient to form a belief; any others raise no issue.¹ The same conclusion was reached in respect to an answer which stated that "the defendant has not sufficient knowledge or information to form a belief whether [certain allegations] are true, and therefore denies the same."²

§ 641. Although the denial of knowledge or information may be used in respect to every *form* of traverse, whether general or specific, yet it cannot be resorted to under all circumstances. There are occasions in which the defendant will not be permitted to say that he has no knowledge or information of the matter sufficient to form a belief, because such a statement would be a palpable falsehood, a plain impossibility. When the allegation in the complaint or petition is of a fact which must of necessity be within the personal knowledge of the defendant; when it avers an

¹ Gas Co. v. San Francisco, 9 Cal. 458.

² Curtis v. Richards, 9 Cal. 88.

act done or an omission suffered by him personally; when, for example, it states a contract entered into, or a deliberate wrong perpetrated, by himself,— he *must* know whether the averment is true or false. He will not be suffered to assert a defective memory, for such a forgetfulness is contrary to the general experience of mankind. If his recollection is at fault, the law affords him ample opportunity and means of refreshing it during the interval between the service of the adverse pleading and the time for answering. A denial, therefore, of the form described, pleaded in answer to allegations of a nature purely personal to the defendant, will be treated as sham and evasive, and will be struck out on motion. A demurrer would not be the proper remedy; because the objection is not to the sufficiency *as a defence*, but to the bad faith of the party in interposing a pleading of such a character. The rule was accurately stated by Mr. Justice Field of the California Supreme Court substantially as follows: "If the facts alleged are presumptively within the knowledge of the defendant, he must deny positively, and a denial of information or belief will be treated as an evasion. Thus, for example, in reference to instruments in writing alleged to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description, or of the copies in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. If the facts alleged are not such as must be within the personal knowledge of the defendant, he may answer according to his information and belief."¹

IX. *Issues raised by Denials, and what may be proved under them.*

§ 642. In discussing the topics embraced within this subdivision, the same doctrines apply both to general and to specific denials. The only difference is in respect to the extent of their effect and operation.² The general denial raises an issue with the entire complaint or petition, and admits evidence in contradiction to all the plaintiff's material allegations; while the spe-

¹ *Curtis v. Richards*, 9 Cal. 33, 38. See also, to the same effect, *Wing v. Dugan*, 8 Bush, 583, 586; *Jackson Sharp Co. v. Holland*, 14 Flor. 384, 386.

² See *Coles v. Soulsby*, 21 Cal. 47, 50, per Field C. J.

cific denial raises an issue with the particular allegation alone to which it is directed, and only admits evidence in contradiction thereto. The same rules as to the effect of the general denial upon the issue raised with the whole complaint, and the proofs admissible under it, apply with equal force to the specific denial in respect to the narrower issue which it creates and the evidence which it admits. It will only be necessary, therefore, to discuss the objects and functions of the general denial, since the results of this discussion will be true of specific denials within their limited operation. In pursuing this discussion, I shall inquire (1) into the nature and effect of the general denial and the issues formed by it, and shall therein compare and contrast it with the general issues of the common law; (2) the general nature of the evidence which may be admitted, and the defences which may be set up under it; and (3) I shall state and classify a number of particular defences, and matters of defence, which have been held admissible or not admissible, or, in other words, a number of particular defences which have been determined to be defences by way of denial, or to be new matter.

§ 643. 1. No topic connected with the whole subject of pleading is, I think, more important than the questions thus suggested. Undoubtedly, much of the confusion, redundancy, and unscientific character of pleadings under the codes is the result of ignorance or uncertainty as to the power of the general denial to admit defences upon which the defendant relies. In very many instances the answer is made a long and rambling mass of purely evidentiary details, when the simple general denial, not exceeding two or three lines in length, would be fully as efficacious, and would present the issue in a sharper and clearer manner. The general denial is, in some respects, broader in its scope, and in some respects narrower, than the general issues as a whole at the common law. But little aid can be obtained from the rules which governed the use of the latter traverses, except by way of contrast; and yet a statement in outline of those rules is important, in order that the contrast may be seen. I shall, therefore, by way of preface, collect and arrange the fundamental doctrines of the common law concerning the employment and effect of the general issue in the various ancient forms of action.

§ 644. All the possible defences in bar may be reduced to a

few comprehensive classes; and this classification will assist us in appreciating the distinction between those defences which may be proved under a traverse of the plaintiff's allegations and those which must be pleaded specially as "new matter," or matter in confession and avoidance. In respect to contracts, all possible defences must either (1) deny that there ever was a cause of action; or (2) admit there *was once* a cause of action, but avoid it by showing subsequent or other matter. The first of these two classes may be subdivided into (a) those which deny that a sufficient contract was ever made; and (b) those which admit that a sufficient contract was originally made, but show that, *before breach thereof*, — that is, before the time for performance arrived, — it was in some manner discharged, or ceased to be binding. Similar divisions might be made of the defences in bar to personal actions for all purposes. From this analysis the following conclusions may be drawn: Defences in bar to all legal actions on contract or for tort may be separated into, *first*, those which deny that the plaintiff ever had the cause of action alleged, because either no *foundation* therefor ever existed, or, if such *foundation* ever existed, it had been in some manner removed before the cause of action arose therefrom; and *second*, those which admit that a cause of action once existed, but show that it no longer exists.¹

§ 645. *The General Issues at the Common Law.* 1. *In assumpsit.* The general issue in the action of *assumpsit*, called *non-assumpsit*, was, "That the defendant did not undertake or promise in the manner and form as the plaintiff hath complained against him." When we look at the grammatical construction of this plea, it is plain that *in terms* it only denies *the promise*; and yet it was understood as putting in issue every allegation of the declaration. The original scope and effect of this general issue were greatly enlarged by and through a long series of judicial decisions, until the following doctrine became fully established by the courts: namely, that, under this general issue in the action of *assumpsit*, there might be proven any defence falling within the *first* of the two general classes stated at the close of the last paragraph; that is, any defence showing that the plaintiff never had a cause of action, and also most of the defences falling within the second

¹ See 1 Ch. Pl. (Springfield ed., 1840), pp. 471, 472.

of those classes, and showing that there was no subsisting cause of action at the time of the commencement of the suit.¹ The following are examples of the particular defences which illustrate this general proposition, and which might be given in evidence under the general issue of *non-assumpsit*: Those which insisted that no such contract as the one alleged had ever been *in fact* made; those which admitted that the contract had been *in fact* made, but denied that it was *in law* obligatory upon the defendant, which class embraced among others the following particular cases: that another person ought to have been made plaintiff; that defendant was an infant, a lunatic, or drunk, or a married woman, and therefore incapable of contracting; that the contract was made under duress; want of a sufficient or of a legal consideration; illegality in the contract, as gaming, usury, stock-jobbing, &c.; that the contract was void under the Statute of Frauds; release or discharge before breach; alteration; non-performance of a condition precedent by the plaintiff: those which admitted not only that the contract had *in fact* been made, but also that a cause of action thereon had once existed, and asserted that it had been discharged before the suit was brought; which class embraced, among others, payment, accord and satisfaction, a promissory note or other negotiable security given for the debt and still outstanding, foreign attachment, arbitrament, former-recovery for the same cause, a higher security given, and release.² In many of the States a notice of the matter constituting most of the *special* defences was required by statute to accompany the general issue in order that the same might be proven on the trial; but my object is merely to contrast the pure *common-law* doctrines with those introduced by the code. It is evident that there were very few defences which *must* have been specially pleaded in *assumpsit*; and the result was, that the parties went to trial in the majority of cases (where this ancient system prevailed unchanged) without the plaintiff having received any intimation on the record of the nature of the defence he was to meet. This great evil was remedied in England by statute and by rules of court made thereunder in 1834, which entirely changed the functions of the general issue, and required that most of the foregoing defences should be pleaded specially.

¹ 1 Ch. Pl., pp. 476-478.

² 1 Ch. Pl., pp. 476, 477.

§ 646. 2. *In debt*. In the action of *debt*, upon simple contract or legal liabilities, the general issue, called *nil debet*, was, "That the defendant doth not owe the said sum above demanded, or any part thereof, in manner and form as the plaintiff hath above complained against him." This language being in the present tense, taken in its plain grammatical sense, denies the existence of the debt at the time from which it speaks. Although, strictly speaking, it controverts a conclusion of law only, yet it was regarded as the proper mode of putting in issue all the averments of fact; and under it, as a general rule, any defence could be proved which showed that nothing was due at the time of the pleading, — not only every defence which showed that the debt had never in fact or in law been contracted, but also every one which showed that the debt once contracted had been discharged, as payment, release, and the like. Those which were required to be specially pleaded were very few, and were regarded as exceptions to the general rule; the most important were the Statute of Limitations, tender, and set-off, neither of which could be proved under the plea of *nil debet*.¹ In the action of debt upon a specialty, there were two cases. (1.) Where the deed was the mere inducement to the action, and the other matter of fact was the real foundation thereof. In this case also the general issue was *nil debet*, and it was governed by the same lax rule which controlled its use when the action was upon contracts not under seal.² (2.) Where the deed was the very foundation of the action. There was in this case no answer of *nil debet*, nor any analogous thereto. The general issue was *non est factum*, as follows: "And the said defendant says that the said supposed writing obligatory [*or indenture, or agreement*] is not his deed." This plea was far more restricted in its operation than either of the others above mentioned. It admitted proof of matters going to show that the instrument was never executed by the defendant in point of fact, and of matters tending to show that for some reason the deed was void at the common law *ab initio*; but facts designed to show that it was simply voidable, or that it was void by statute, and, in short, all other defences impeaching its legality, and all defences consisting in matters of discharge, such as payment and release, or of performance or of excuse, and the like, must be specially pleaded.³

¹ 1 Ch. Pl., p. 481.

² 1 Ch. Pl., pp. 483, 484.

³ Ibid. p. 482.

§ 647. 3. *In covenant*. In the action of *covenant*, the only plea which might be called the general issue was *non est factum*. Its form and the rule as to the defences provable under it were identical with those which existed in reference to the same answer in *debt* upon a specialty. The defendant might prove that he did not execute the agreement in suit, but could not prove that he had not broken its covenants. In other words, this general issue did not put in issue all the allegations of the declaration ; and all defences other than the non-execution of the instrument must be pleaded specially.¹

§ 648. 4. *In account*. There was no general issue in this action. All matters which went to show that the plaintiff was not entitled to the judgment for an accounting must be pleaded specially. All other matters which, conceding that the defendant was liable to account, merely affected the act of accounting itself, and the credits and debits therein, could not be pleaded in bar of the action, but were to be set up in the proceeding before the officer who heard it, — the auditor or master.²

§ 649. 5. *In detinue*. The action of *detinue* was used in cases to which that of *replevin* had been very generally extended in the various States, and in which the action “for the claim and delivery of personal property” is the appropriate means of relief under the code. The general issue, *non detinet*, was the following formula: “And the said defendant says that he does not detain the said goods and chattels in the said declaration specified, nor any part thereof, in the manner and form as the said plaintiff hath above complained.” It admitted proof of any facts showing that the defendant did not withhold the goods, or that the property or possession thereof was not in the plaintiff. In other words, it put in issue the plaintiff’s property and possession and the defendant’s detention. This general rule, apparently so simple, had, however, been refined upon, and nice distinctions had been introduced. Thus the defendant could not prove that the goods had been *pledged* to him, but might prove that they had been *given* to him by the plaintiff, since the latter fact denied the plaintiff’s property. The defence of lien must always have been specially averred.³

§ 650. 6. *In case*. The general issue in this most important and comprehensive action was termed *not guilty*, and was in the

¹ 1 Ch. Pl., p. 487.

² Ibid. p. 488.

³ 1 Ch. Pl., p. 488.

following form: "And the said defendant says that he is not guilty of the premises [*or grievances*] above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him." The action of *case* was said to have been based upon equity and good conscience; and, under the above issue, any matter which showed that the plaintiff ought not in justice to recover might in general be proved. The general rule was that the plea of *not guilty*, denying the entire declaration, admitted proof (1) of all matters which tended to contradict any averment in the declaration, (2) of all matters which operated as a discharge of the cause of action, and (3) of all matters by way of justification or excuse.¹ Thus, for example, in the action on the case for defamation, slander, or libel, all defences could be established under the answer of *not guilty*, except those which directly confessed the speaking or publishing the words, *and their defamatory nature under ordinary circumstances*, but avoided the cause of action by showing that they were not defamatory *under the special circumstances of that case*; namely, the defences of "justification" and of "privileged communication." These two defences — the one setting up the truth of the words, and the other setting up facts which removed the imputation of malice, and in reality excused the speaking or publishing — must be pleaded specially. Every other matter might be proved under the general issue; although an election was frequently possible in respect to such defences, whether they should be presented in this manner, or should be pleaded specially.²

§ 651. 7. *In trover*. The general issue in *trover* was also *not guilty*, and in the same form as in *case*, the action itself being a modification or special application of the more general action of *case*. This general issue was the most comprehensive of any known to the common law, and admitted all possible defences, with perhaps one or two exceptions. In fact, pleading specially was almost unknown in *trover*. No defences were ever presented in this manner except the Statute of Limitations, and release; and it was doubted whether such mode was necessary even in these two instances.³

§ 652. 8. *In replevin*. The plea which was called, although im-

¹ 1 Ch. Pl., pp. 490, 491.

³ 1 Ch. Pl., p. 498.

² Ibid. pp. 491-497.

properly, the general issue in *replevin*, was *non cepit*. "And the defendant says that he did not take the said cattle [or goods and chattels] in the said declaration mentioned, or any of them, in manner and form as the said plaintiff hath above complained." This answer put in issue the fact of the *taking*, and also the taking in the *place mentioned in the declaration*; the latter fact being material in the special purposes for which this action was used at the common law.¹ The action itself, in respect of its original objects and the rules of pleading controlling it, bears but little resemblance to the action bearing the same name which was generally in use in the various States, and which had been greatly modified by statutes and by judicial decisions; and certainly bears still less likeness to the proceeding for "the claim and delivery of personal property," introduced by the codes.

§ 653. 9. *In trespass*. The general issue *not guilty* differed slightly in form from that in *case*. "And the said defendant says that he is not guilty of the *trespasses* above laid to his charge, or any part thereof, in the manner and form as the said plaintiff hath above complained." The effect of this plea was confined to the scope and extent of its denials in their grammatical sense; in other words, as the language puts in issue only the trespasses, the defendant was restricted to the proof of matters tending to show that he did not commit the acts complained of. *Trespass* might be brought for violence to the person, for injury to or the taking and carrying away of goods, and for intrusion upon or injury to land. In the first case, the defendant might prove that he committed no assault, battery, false imprisonment, &c.; and, in the second, that he did not injure nor take nor carry away the chattels. In the third case, the scope of the general issue was somewhat broader. To maintain the action, possession of the land by the plaintiff was necessary; and the declaration averred his right by stating that it was "the close of the plaintiff." The general issue was regarded as denying this possessory right of the plaintiff in the land; so that, under it, the defendant might show not only that he did not commit the acts complained of, but also that the plaintiff had no possessory right to the premises, by proving title and the right of possession in himself, or in some other person under whom he claimed, or by whose authority he had acted.

¹ 1 Ch. Pl., p. 498.

All other defences in either of these three phases of the action must be specially pleaded.¹

§ 654. 10. *In ejectment*. The only plea in *ejectment* was the general issue of *not guilty*, as in *trespass*; and, under it, all possible defences were admitted in proof.²

§ 655. The general rules of which I have thus given an outline were greatly modified by statute and by new rules of pleading prepared in pursuance thereof by the English judges in 1834. These modifications, of course, had no compulsive authority in this country; and, as they effected very great changes in the common-law doctrines, they were not followed by the courts of the American States which adhered to the ancient procedure. The principal object and effect were to restrict the scope and operation of the general issue in certain actions, — *assumpsit*, *debt*, *case*, and *trover*, — and to require many defences to be specially pleaded which could before have been proved under the general issues. It will be seen in the sequel that the principles of pleading embodied in the American codes necessarily lead, in part, to the same results. It is my design, however, to compare or contrast the doctrines of the reformed American procedure with those of the common law, and not with the changes made by English legislation.

§ 656. There are a few points which should be noticed in relation to the foregoing rules which governed the use of the general issue. In the first place, there was no uniformity in its operation. Its effect as a pleading, its extent and scope in the admission of various defences, did not depend upon any qualities inherent in itself, but resulted rather from the particular form of action in which it was employed. In the second place, the formula which was adopted in these different actions did not in any single instance purport, according to the literal import of the language, to answer and deny all the allegations of fact contained in the declaration, and which together made up the plaintiff's cause of action, but rather singled out and contradicted some particular one of these averments. As, for example, it denied the promise in *assumpsit*, the execution of the deed in *covenant* and in one species of *debt*, the commission of the acts complained of in *case* and in *trespass*. Even in the single instance of *nil debet*,

¹ 1 Ch. Pl., pp. 500-502.

² 1 Ch. Pl., p. 507.

where issue seems to be taken by the express terms of the plea with the entire cause of action, the denial was not directed to the facts, but rather to the legal conclusion which arises from these facts. In the third place, this answer, in its practical operation, was miscalled the "*general issue*;" for it ranged through almost every possible *dégré* of efficacy. In some instances, it did not put in issue *all* the allegations of the declaration, and was therefore far less than a *general* denial; in other instances, it not only put in issue all the allegations of the declaration, but also admitted proof of nearly all the defences which the defendant could rely upon, and thus united in itself all the possible denials, and almost all the matters of affirmative defence, which could be used to defeat the plaintiff's recovery. In no single instance did it perform the exact functions of the general denial; that is, in no case did it barely put in issue all the averments of the declaration, compelling the plaintiff to prove them, and permitting the defendant to disprove them. It either fell short of, or went far beyond, this natural, and, as it seems to me, strictly logical, office and function. In this respect, the theory of pleading embodied in the codes is more severely scientific as well as more simple and practical than that which lay at the basis of the common-law system. The general issue of *non-assumpsit* in *assumpsit*, of *nil debet* in debt on simple contract, and of *not guilty* in case and trover, in one important feature, resembled the modern "*general denial*," since they did put in issue the entire declaration, and acted as a traverse of all its averments, and, as a consequence, admitted any evidence which tended to contradict those averments. But they all went far beyond this limit, and allowed the introduction of matters which were in no sense denials or contradictions. This peculiar characteristic of these forms of the general issue makes it impossible to draw analogies from them to aid in determining the true office of the general denial. It is only by contrast that any assistance can be obtained from the ancient rules and doctrines.

§ 657. I pass from the foregoing prefatory matter to examine the nature and office of the general denial, and the issues raised by it. In pursuing this inquiry, I shall rely upon the judicial opinions found in decisions which are universally regarded as authoritative, even using their language instead of my own when-

ever practicable. The case of *McKyring v. Bull*¹ is conceded to be the leading one. The opinion of Mr. Justice S. L. Selden is so full, accurate, and able an exposition of the subject, that other judges have done little more than repeat his conclusions. The action was brought to recover compensation for work and labor. The complaint alleged that the plaintiff entered into the employment of the defendant at a certain date, and continued in such employment at defendant's request, doing work and labor until another specified date, and that the services so rendered were worth the sum of \$650; and concluded as follows: "That there is now due to this plaintiff, over and above all payments and offsets on account of said work, the sum of \$134; which said sum defendant refuses to pay: wherefore the plaintiff demands judgment for the last-mentioned sum, and interest from the 4th day of May, 1854." The answer was only a general denial. On the trial, the defendant offered to prove payment as a defence to the action; but the evidence was excluded, on the ground that the defence should have been pleaded. He then offered to prove part payment in mitigation of damages; but this was also rejected for the same reason. The case thus presented two questions to the Appellate Court for decision: (1) Whether payment could have been proved as a defence under the general denial; (2) whether it could have been proved in mitigation of damages. If the action had been *assumpsit* or *debt*, the evidence would have been admissible in either aspect. The opinion of Mr. Justice Selden will be found in the foot-note.²

¹ *McKyring v. Bull*, 16 N. Y. 297, decided in 1857.

² *McKyring v. Bull*, 16 N. Y. 297, 299. "While the general issue both in *assumpsit* and *debt* was in theory what the general denial allowed by the code is in fact,—namely, a simple traverse of the material allegations of the declaration or complaint,—yet from the different phraseology adopted in the two forms of action, a very different result was produced. The declaration in *debt* averred an existing indebtedness; and this amount was traversed by the plea of *nil debet* in the present tense: hence nothing could be excluded which tended to prove that there was no subsisting debt when the suit was commenced. In *assumpsit*, on the contrary, both the averment in the declaration and the trav-

erse in the plea were in the past instead of the present tense, and related to a time anterior to the commencement of the action. Under *non-assumpsit*, therefore, so long as the rule of pleading which excludes all proof not strictly within the issue was adhered to, no evidence could be received except such as would tend to show that the defendant never made the promise. That this was the view taken of these pleas in the earlier cases is clear. . . . We find, however, that a practice afterwards grew up, and came at last to be firmly established, of allowing, under the plea of *non-assumpsit*, evidence of various defences which admitted all the essential facts stated in the declaration, but avoided their effect by matter subsequent, such as payment, accord, and satis-

§ 658. The discussion of the second question presented in this case is so complete and instructive, that I adopt it as a portion of

faction, arbitrament, release, &c. The history and progress of this anomaly is easily traced." Mr. Justice Selden goes on to cite a series of cases showing this course of change by which *non-assumpsit* came at last to be the comprehensive plea which I have before described, and to state the theories by which judges and text-writers have attempted to reconcile this new doctrine and rule with the grammatical form of the plea. He then proceeds (pp. 301, 302): "These errors proved in their consequences subversive of some of the main objects of pleading. They led to surprises upon the trial, or to an unnecessary extent of preparation. The courts, however, found it impossible to retrace their steps, or to remedy this and other defects in the system of pleading without authority from Parliament. This authority was at length conferred by the act of the 3d and 4th William IV., ch. 42, § 1; and the judges in Hilary Term thereafter adopted a series of rules, one object of which was to correct the errors which have been adverted to. The first rule adopted under the head of *assumpsit* provided in substance that the plea of *non-assumpsit* should operate when the promise was express as a denial of the promise; and when it was implied, of the matters of fact upon which the promise was founded. The object of this rule was to restore pleading in *assumpsit* to its original logical simplicity. It was obviously intended as a mere correction of previous judicial errors. It interprets the plea of *non-assumpsit* strictly according to its terms, and thus plainly indicates that the courts had erred in departing from those terms. That this was the view of the judges is shown by the different course taken in regard to the plea of *nil debet*. As this plea, construed according to its terms, included every possible defence within the issue which is formed, the judges did not attempt to change the import of those terms, but abrogated the plea. Rule two, under the head of Covenant and Debt, provides that 'the plea of *nil debet* shall not be allowed in any action;' and rule three substitutes the

plea of *nonquam indebitatus* in its place. Thus the whole practice, which had continued for centuries, of receiving evidence of payment and other special defences under the plea of *nil debet* or *non-assumpsit*, was swept away." Applying this historical analysis, he continues (pp. 302, 303): "There are several inferences to be drawn from this brief review which have a direct bearing upon our new and unformed system of pleading. The first is, that no argument in favor of allowing payment or any other matter in confession and avoidance to be given in evidence under a general denial can be deduced from the former practice in that respect, as this practice has been abandoned in England, not only as productive of serious inconvenience, but as a violation of all sound rules of interpretation. A second inference is, that, in regard to pleading, it is indispensable to adhere to strict logical precision in the interpretation of language. The anomaly which has been referred to was wholly produced by the slight deviation from such precision in the action of *indebitatus assumpsit* which has been pointed out. But the most important inference to be deduced from the historical sketch just given consists in an admonition to adhere rigidly to that rule of pleading which permits a traverse of facts only, and not of legal conclusions; and this brings us to the pivot upon which the point under consideration must necessarily turn. The counsel for the defendant insists, that, as the answer controverts every allegation of the complaint, it puts in issue the allegation with which it concludes; viz., that there was due to the plaintiff at the commencement of the suit, over and above all payments and offsets, the sum of \$134. But this allegation is a mere legal conclusion from the facts previously stated. Its nature is not changed by the addition of the words 'over and above all payments.' No new fact is thereby alleged. The plaintiff voluntarily limits his demand to a sum less than that to which, under the facts averred, he would be entitled. Were courts to allow allegations of this sort to

the text. "The next question is, whether evidence of payment, either in whole or in part, is admissible in mitigation of damages. As the code contains no express rule on the subject of mitigation, except in regard to a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By these principles, defendants in actions sounding in damages were permitted to give in evidence, in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but, in many cases, facts showing that the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation, that, if properly pleaded, it would have constituted a complete defence. Thus, in *Smithers v. Harrison*,¹ the truth of the charge was received in mitigation in an action of slander, although not pleaded. Again: in the case of *Abbot v. Chapman*,² which was an action of assumpsit, the defendant having given in evidence a release, Lord Holt said that 'he should have pleaded *exoneravit*, but that the evidence was admissible in mitigation of damages.' So too, in the modern case of *Nicholl v. Williams*,³ which was assumpsit for use and occupation, the defendant, having pleaded payment to a part of the demand, and *non-assumpsit* to the residue, was permitted, upon the trial, to prove payment in full; but it was held that the evidence could only go in mitigation, and that the plain-

be traversed, they would fall into the same difficulty which existed in regard to the plea of *nil debet*, and which led the judges of England to abolish that plea. It would be impossible under such a rule, in a great variety of cases, to exclude any defence whatsoever, if offered under an answer containing a general denial. In England, as we have seen, after centuries of experience, it has been found most conducive to justice to require the parties virtually to apprise each other of the precise grounds upon which they intend to rely; and the system of pleading prescribed by the code appears to have been conceived in the same spirit. It was evidently designed to require of parties in all cases a plain and distinct statement of the facts which they intend to prove; and any rule which would enable the defendants, in a large class of cases, to evade this requirement, would be inconsistent with

this design. The case of *Van Gieson v. Van Gieson*, 12 Barb. 520, 10 N. Y. 316, contains nothing in opposition to the doctrine here advanced. That case simply decided, that, where the complaint contained an averment of non-payment, a plea of payment formed a complete issue; that, payment having been denied in the complaint, it was unnecessary to repeat that denial in a reply. My conclusion, therefore, is, that neither payment nor any other defence which confesses and avoids the cause of action can in any case be given in evidence as a defence under an answer containing simply a general denial of the allegations of the complaint."

¹ *Smithies v. Harrison*, 1 Lord Raym. 727.

² *Abbot v. Chapman*, 2 Lev. 81.

³ *Nicholl v. Williams*, 2 M. & W. 768.

tiff was entitled to judgment for nominal damages. It is obvious that this practice was open to serious objections. It enabled defendants to avail themselves of their defences for all substantial purposes without giving any notice to the plaintiff. . . . But in regard to payment, release, &c., so long as they were received in evidence under the general issue in bar, no objection could be made to allowing them in mitigation. As soon, however, as this practice was abrogated by the rules of Hilary Term, 4th William IV., the question as to the admissibility of payment in mitigation at once arose." The learned judge here traces the course of English decisions upon this question, citing and reviewing a number of cases, and referring to certain additional legislation;¹ and concludes this discussion as follows: "The matter is now placed, therefore, in the English courts, upon a footing of perfect justice. If the demand for which an action is brought has once existed, and the defendant relies upon its having been reduced by payment, he must appear and plead.

§ 659. "It is to be determined in this case whether we have kept up with these courts in our measures of reform. The rules of Hilary Term (4 William IV.) and the system of pleading prescribed by the code have, in one respect, a common object; viz., to prevent parties from surprising each other by proof of what their pleadings give no notice. These rules, according to the construction put upon them by the courts, were found inadequate, so far as proving payment in mitigation is concerned, to accomplish the end in view; and it became necessary to adopt the rule of Trinity Term (1st Vict.) to remedy the defect. If the provisions of the code are to receive in this respect a construction similar to that given to the rules of Hilary Term, then an additional provision will be required to place our practice upon the same basis of justice and convenience with that in England. But is such a construction necessary? Section 149 of the code provides that the answer of the defendant must contain, 1. A general or specific denial of the material allegations of the complaint; and, 2. A statement of any new matter constituting a defence or counterclaim. The language here used is imperative, — '*must contain.*' It is not left optional with the defendant whether he will plead

¹ Lediard v. Boucher, 7 C. & P. 1, per M. & W. 228; Rule of Trinity Term, 1st Lord Denman; Shirley v. Jacobs, 7 C. & Vict. 4 M. & W. 4. P. 8, per Tindal C. J.; Henry v. Earl, 8

new matter or not; but all such matter, if it constitutes 'a defence or counterclaim,' must be pleaded; and this is in entire accordance with the general principles of pleading. The word 'defence,' as here used, must include partial as well as complete defences; otherwise it would be no longer possible to plead payment in part of the plaintiff's demand, except in connection with a denial of the residue; since section 153 provides that 'the plaintiff may in all cases demur to an answer containing new matter, when, upon its face, it does not constitute a counterclaim or *defence*.' Such a restriction would be not only contrary to the general spirit of the code in regard to pleading, but would obviously conflict with § 244, subdivision 5, which provides that 'where the answer expressly, or by not denying, admits part of the plaintiff's claim to be just, the court may, on motion, order such defendant to satisfy that part of the claim,' &c. The question to be determined, then, is, whether these provisions are limited in their operation to cases where the defendant seeks to avail himself of new matter strictly as a defence either in full or *pro tanto*, or whether they extend to the use of such matter in mitigation. Were there nothing in the code to indicate the intention of the legislature on this subject, we might feel constrained to follow the construction put by the English courts upon the rules of Hilary Term. But § 246 provides that in all actions founded upon contract brought for the recovery of money only, in which the complaint is sworn to, if the defendant fails to answer, the plaintiff is entitled absolutely to judgment for the amount mentioned in the summons without any assessment of damages. It is plain, that, in this class of actions, defendants who have paid part only of the plaintiff's demand must appear and plead such part payment, or they will lose the benefit of it altogether. The provisions of § 385 afford no adequate remedy in such cases, because the offer to allow judgment for a part does not relieve the defendant from the necessity of controverting the residue by answer. Section 246 could never have been adopted, therefore, without an intention on the part of the legislature that § 149 should be so construed as to require defendants, at least in this class of cases, to set up part payment by answer; and it is difficult to suppose that they intended the section to receive one construction in one class of actions, and a different one in another. My conclusion, therefore, is, that § 149 should be so construed as to require defendants

in all cases to plead any new matter constituting either an entire or partial defence, and to prohibit them from giving such matter in evidence upon the assessment of damages when not set up in the answer. Not only payment, therefore, in whole or in part, but release, arbitrament, accord and satisfaction, must here be pleaded. In this respect, our new system of pleading under the code is more symmetrical than that prescribed by the rules adopted by the English judges."¹

§ 660. To this admirable judgment I shall add a few selections from opinions which seem to express the theory of the new system in an accurate manner, or to illustrate its fundamental principles. The Supreme Court of New York, in an early case, described the office of the general denial in the following brief but very accurate manner: "Under a denial of the allegations of the complaint, the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish in order to sustain his action."² "Under the general denial of the code, evidence of a distinct affirmative defence is not admissible. The only evidence which the defendant is entitled to give is limited to a contradiction of the plaintiff's proofs, and to the disproof of the case made by him."³

§ 661. Whenever a reply is made necessary to all new matter contained in the answer, the question as to the nature of a defence has often arisen upon the plaintiff's failure to reply to allegations which the defendant insisted were new matter, and therefore admitted to be true by means of the omission, but which the plaintiff claimed to be mere argumentative denials, or, in other words, unnecessary averments of evidentiary facts which could be proved under a denial. In passing upon such a question, the Supreme Court of Minnesota fully approved and adopted the general doctrine which has been stated in the text.⁴ In

¹ *McKyring v. Bull*, 16 N. Y. 297, 304-307.

² *Andrews v. Bond*, 16 Barb. 633, 641, per T. A. Johnson J.

³ *Beatty v. Swarthout*, 32 Barb. 293, 294, per E. Darwin Smith J.; and see *Wheeler v. Billings*, 38 N. Y. 263, 264, per Grover J.

⁴ *Nash v. St. Paul*, 11 Minn. 174, 178, per Wilson C. J.: "An answer must either deny the facts alleged in the com-

plaint, or set up new matter by way of avoidance. Those matters which the defendant should affirmatively plead as a defence are 'new matter' within the meaning of our statute; those that amount merely to a traverse of the allegations of the complaint are not. Was it, in this case, incumbent on or proper for the defendant to set out these matters in the answer? I think that it may be correctly laid down as a general

another case before the same court, the question was examined with great care and marked ability. The action was upon a contract of sale: the answer consisted of specific denials of each allegation in the complaint; and the defendant offered to prove that the contract was entered into on Sunday, and was therefore illegal and void. An extract from the elaborate opinion of the court will be found in the note.¹

§ 662. In an action to recover possession of chattels where the complaint alleged property in the plaintiff, and the answer was a general denial, evidence tending to show that the plaintiff was not the owner was excluded on the trial. This ruling was disapproved on appeal, the court saying: "The answer is a denial of each and every allegation of the complaint. The allegation of ownership is therefore denied. In *Bond v. Corbett*,² it was held that any thing which tends to *directly* controvert the allegations in the complaint may be shown under the general denial. The defendant might, therefore, introduce evidence to show that plaintiff was not the owner, nor entitled to possession."³ The same doctrine is maintained by the Supreme Court of Indiana.⁴

rule of pleading, that a defendant who admits the *facts* alleged, but wishes to avoid their effect, may and should affirmatively set up the special matters on which he relies as an avoidance. *Finley v. Quirk*, 9 Minn. 194. In this case the answer admits a contract *in fact* with the plaintiff, but denies its legal validity, and sets up the matters which shows it void."

¹ *Finley v. Quirk*, 9 Minn. 194, 200, per Wilson C. J.: "The plaintiff can only allege facts; and, in the answer, the defendant must either deny the facts alleged in the complaint, or allege new matter by way of defence or avoidance. And where the answer consists merely in a denial, it is quite clear that the plaintiff will only be required to prove, and the defendant only permitted to controvert, the facts alleged in the complaint. In the language of Selden J., in *Benedict v. Seymour*, 6 How. Pr. 298, 'a general traverse under the code authorizes the introduction of no evidence on the part of the defendant, except such as tends directly to disprove some fact alleged in the complaint.' If the question of the *legality* of the sale can be raised by a denial of any

allegation of the complaint, it must be by a denial of the *sale*; for the day or the time of the sale is not a material or traversable fact." The judge then refers to the common-law doctrines respecting the general issue, and, by pursuing a similar train of reasoning to that followed by Selden J. in *McKyring v. Bull*, arrives at the same conclusion, that the general denial of the codes is not the general issue of any common-law form of action. The discussion is thus summed up: "We hold, therefore, (1) that an answer merely by way of denial raises an issue only on the *facts* alleged in the complaint; (2) that the denial of the sale in this case only raised an issue on the sale in point of fact, and not on the question of the legality of such sale; (3) that all matters in confession and avoidance showing the contract sued upon to be either void or voidable must be affirmatively pleaded."

² *Bond v. Corbett*, 2 Minn. 248.

³ *Caldwell v. Bruggerman*, 4 Minn. 270, 276, per Atwater J.

⁴ *Wood v. Ostram*, 29 Ind. 177, 186, per Frazer C. J.: "Whatever may have been the rule formerly, it seems to us,

§ 663. The doctrine thus stated has also been approved by the Supreme Court of Missouri.¹ "It is clear, both upon principle and authority, that, under a general or specific denial of any fact which the plaintiff is required to prove to maintain the action, the defendant may give evidence to disprove it."² The true scope of and limitations upon this form of traverse were well illustrated in a very recent case decided by the New York Court of Appeals. The complaint alleged that the plaintiff was owner of certain shares of stock in a corporation; that the stock had been transferred to one W. to hold for the plaintiff; that W., without the plaintiff's knowledge, had transferred the same to the defendant, in payment, as defendant claimed, of a debt due from him to defendant; and prayed that defendant might be compelled to re-transfer and deliver the same to the plaintiff. The answer was a general denial. The nature and extent of the issues thus presented were discussed, and the principle which controlled them was stated by Mr. Justice Grover, who pronounced the defence inadmissible.³

that, under our Code of Procedure, the matter is made very clear. A denial admits proof of no affirmative defence as the general issue did. It merely puts the plaintiff upon the proof of his averments, and authorizes the defendant, by his evidence, to controvert their truth. He can offer no evidence which proceeds upon the ground that the complaint is true, but that there are other facts which preclude the plaintiff's recovery notwithstanding."

¹ *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 486, 448, per Wagner J.: "When new matter is relied on in evidence or in defence, it must be set out in the answer. Under the old system, by pleading the general issue, every thing was open to proof which went to show a valid defence. But the Practice Act, which has substituted for the general issue an answer, and requires a statement of any new matter constituting a defence, in addition to a special denial of the material allegations of the petition intended to be controverted, has worked a total change in the principles of pleading. The defendant, by merely denying the allegations in the plaintiff's petition, can try only such questions of fact as are necessary to sustain the plain-

tiff's case. If he intends to rely upon new matter which goes to defeat or avoid the plaintiff's action, he must set forth, in clear and precise terms, each substantial fact intended to be so relied on. It follows, that, whenever a defendant intends to rest his defence upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, or else he will be precluded from giving evidence of it on the trial."

² *Greenfield v. Mass. Mut. Life Ins. Co.*, 47 N. Y. 480, 487, per Grover J.; *Wheeler v. Billings*, 38 N. Y. 263.

³ *Weaver v. Barden*, 49 N. Y. 286, 297: "To establish a cause of action, the plaintiff was bound to prove that he was the legal owner of the stock, or was equitably entitled to it as against the defendant. Under this answer, the defendant had a right to give evidence controverting any fact necessary to be established by the plaintiff to authorize a reconveyance, but not to prove a defence founded upon new matter." Recapitulating the facts actually proved by the plaintiff, — namely, those alleged in the complaint as above stated, and that W.

§ 664. A general denial being pleaded in an action on a non-negotiable note brought against the maker thereof, evidence designed to show a want of consideration was rejected at the trial. The New York Supreme Court, in reviewing this ruling, very properly held that this defence may be proved under an answer of denial in actions upon all contracts which do not import a consideration.¹ While the very point decided, that evidence of a want of consideration could be admitted, is undoubtedly correct, the opinion as a whole is very careless and inaccurate, and the general criterion which it lays down is clearly erroneous. There are many classes of defences which show that a cause of action never existed, and which cannot be proved under the general denial, but must be pleaded; as, for example, illegality, fraud, duress, and the like. The learned judge was entirely misled by the analogies drawn from the ancient practice. The general denial puts in issue the facts, which, if true, constitute a *prima facie* cause of action. A consideration is, in general, one of these facts in actions upon contract. When these facts are admitted, but by reason of some extraneous features or elements affecting them they do not produce the otherwise necessary result, that element which constitutes the defence, and which destroys the *prima facie* legal aspect of the facts, is certainly not put in issue by the general denial: it is new matter, and must be specially pleaded.

held the stock as a trustee for the plaintiff,—he continued: "This established the plaintiff's right to the stock as against the defendant, unless he was a *bona fide* purchaser from W. To meet this case, the defendant offered to prove in substance that he was a *bona fide* purchaser from W. The Special Term held, against plaintiff's objection, that this was admissible under the answer. This was error. Under the general denial, the defendant could not introduce evidence tending to show a defence founded upon new matter, but such only as tended to disprove any fact that the plaintiff must prove to sustain his case." The court, however, did not pass upon the question thus discussed by Grover J.: the decision was placed upon a different ground; viz., that defendant was not a *bona fide* purchaser.

¹ *Evans v. Williams*, 60 Barb. 846, per T. A. Johnson J.: "Want of considera-

tion could always be shown under the general issue. Any thing which tended to show that a party to an instrument never had a cause of action against the other party to it was always competent under the general denial of the cause of action alleged, and is so still. The rule does not apply to the holder of negotiable paper who takes it in good faith. But this is not a negotiable note. A general denial now, like the general issue under the former practice, puts in issue the existence, at any time, of the cause of action alleged in the complaint, and admits of evidence tending to establish such defence. If a cause of action has once accrued or existed, and has been satisfied or defeated by reason of something which has occurred subsequently, that is new matter, which must be pleaded in order to render it competent as evidence."

§ 665. The courts of one State alone dissent from this course of judicial decision, and give to the general denial of the code something of the comprehensive operation which belonged to the general issues of *non-assumpsit* and *nil debet* at the common law. The construction adopted in California seems to regard the general denial—certainly in actions upon contract—as admitting any defences which show that there is no subsisting cause of action at the time of the commencement of the suit. At least the defence of payment is thus held admissible; and, if it be so, other similar defences, such as release, accord and satisfaction, and the like, cannot with consistency be rejected. This doctrine of the California courts is stated and illustrated in the following cases: In an action upon contract the complaint contained three counts, each in the form of the common-law *indebitatus assumpsit*. The answer was a general denial. Upon these issues the court said: “In each count of the complaint there is an averment that on, &c., the defendant was indebted to the plaintiff in a specified sum, and promised to pay it, but therein has made default. The answer contained a general denial, which made it incumbent on the plaintiff to prove a subsisting indebtedness from the defendant to the plaintiff at the time of the institution of the suit. Under this denial, it would have been competent for the defendant to prove payment.¹ For the same reason, it is competent to show that the plaintiff had transferred the demand, and that the defendant, therefore, was not indebted to him.”² In another case upon a promissory note the complaint was in the usual form, setting out the note, and alleging that it had not been paid, and that there was due upon it a specified sum, for which judgment was demanded. The answer was the general denial. “The question is,” said the court, “whether the general denial presents any issue of fact. In *Frisch v. Caler*,¹ this question was fully considered. The statute then in force required a replication to new matter in the answer. The answer averred that the note in suit had been paid by the defendant; and it was contended that that averment was admitted because of the failure on the part of the plaintiff to file a replication denying it. But the court held

¹ *Frisch v. Caler*, 21 Cal. 71; *Brown v. Orr*, 29 Cal. 120; *Davanay v. Eggenhoff*, 48 Cal. 395. 294, 299, 300, per Crockett J.; and see especially *Fairchild v. Amsbaugh*, 22 Cal. 572, 574; *Brooks v. Chilton*, 6 Cal. 640.

² *Wetmore v. San Francisco*, 44 Cal.

that it was not new matter ; that the failure to pay the note constituted the breach, and must be alleged ; and that the allegation in the answer — that it had been paid — was only a traverse of the allegation in the complaint that it had not been paid. (See also *Brown v. Orr*.)¹ The doctrine then laid down has not since been departed from, so far as we are aware, except in the case of *Hook v. White* ;² and that case, so far as it holds that the allegation in the complaint that the note remains unpaid is immaterial, and that a denial of the allegation does not put any fact in issue, ought, in our opinion, to be overruled. The general denial in this case puts in issue the averment of the complaint, that the promissory note remained due and unpaid.”³ This decision falls far short of sustaining the sweeping doctrine of Mr. Justice Crockett, in the preceding case of *Wetmore v. San Francisco*, as to the effect of the general denial. When the opinion of Mr. Justice Rhodes is analyzed, it does not in fact lay down any principle different from that maintained by the cases cited from the courts of other States. It simply asserts that the general denial puts in issue the allegations of the complaint, and that the negative averment of non-payment, when traversed in this manner, produces a complete issue, under which evidence of payment may be offered. This is very far from holding, with Crockett J., that the defence of payment is admissible under the general denial in all cases.

§ 666. The foregoing extracts from the judgments of so many courts leave little room and little need for any addition by way of comments. The unanimity of opinion in respect to the fundamental principles of pleading embodied in the codes is almost absolute ; and this principle has been so clearly formulated by several of the judges, that no difficulty ought to arise in its practical application. The office of the general denial, like that of the old traverses, is twofold : it forces the plaintiff to prove all the material allegations of fact contained in his complaint or petition, and constituting his cause of action, by sufficient evidence at least to make out a *prima facie* case ; it also permits the defendant to offer any and all legal evidence which controverts those averments, and contradicts the plaintiff's proofs. It is clear that no exact statement can be made defining with universal precision what particular issues the general denial raises in all possible

¹ *Brown v. Orr*, 29 Cal. 120.

² *Hook v. White*, 86 Cal. 299.

³ *Davanay v. Eggenhoff*, 48 Cal. 895, 397, per Rhodes J.

cases, and what particular defences it admits; and in this respect it differs from the general issue. As a result of the common-law methods of pleading, and the uniformity of averment necessarily used in all actions of the same class, the operation of the general issue in every suit was exactly defined; and this was especially so after the rules made in 4th William IV. (1834). Certain averments, and none others, of the declaration, were put in issue by it; certain defences, and none others, were admissible under it. This precise rule cannot be laid down in respect of the general denial, because there is no *necessary* uniformity in the averments of complaints or petitions in actions of the same kind brought on the same substantial facts, and seeking the same relief. As the general denial puts in issue *all* the material allegations made by the plaintiff, and admits all evidence contradicting them, what issues it *actually* raises, and what defences it *actually* admits, in a given case, must depend upon the frame of the complaint or petition, and upon the number and nature of the allegations which the plaintiff has inserted therein. It could be said of the general issue in all actions upon contract, — assumpsit, debt, covenant, — after the rules of Hilary Term, 1834, that the defence of payment was never admissible under it. If we would speak with perfect accuracy, such language cannot be adopted as the expression of a universal rule in respect of the general denial; for the plaintiff may so shape his pleading, and introduce into it such a negative averment of non-payment, that the proof of payment would be simply supporting the general denials of the answer. Several cases already cited sufficiently sustain the correctness of this position; and others, to be hereafter more particularly referred to in a subsequent portion of this section, and in the next section under the head of Payment, will furnish various examples of this feature of distinction between the general denial and the general issue.¹ Additional cases, bearing upon the nature and effect of the general denial, are collected in the foot-note.²

¹ See *Quin v. Lloyd*, 41 N. Y. 349; *Marley v. Smith*, 4 Kans. 183; *Frisch v. Caler*, 21 Cal. 71; *White v. Smith*, 46 N. Y. 418; *Van Gieson v. Van Gieson*, 10 N. Y. 816.

² *Button v. McCauley*, 38 Barb. 413; *Scholar v. Hudson River R. R.*, 38 Barb.

658; *Schermerhorn v. Van Allen*, 18 Barb. 29; *Hendricks v. Decker*, 35 Barb. 298; *Perkins v. Ermel*, 2 Kans. 325; *Adams Ex. Co. v. Darnell*, 31 Ind. 20; *Lafayette, &c. R. R. v. Ehman*, 30 Ind. 83; *Watkins v. Jones*, 28 Ind. 12; *Frybarger v. Coke-fair*, 17 Ind. 404; *Bingham v. Kimball*, 17

§ 667. As the general denial forms an issue upon the entire cause of action set up by the plaintiff, and forces him to prove the same substantially as alleged, the question becomes one of great practical importance: What are the averments in the complaint or petition which are thus negatived, and which must be established by sufficient proof on the trial? The full answer to this question belongs rather to a discussion of the requisites of the plaintiff's than of the defendant's pleading, and will be found in Chapter Third. The universally accepted rule is, that only those averments of the complaint or petition which are material and proper are put in issue by a denial either general or specific in its form. "Material" or "proper" are not, however, synonymous with "necessary." A plaintiff may insert in his pleading allegations which are unnecessary in that position, and which are not in conformity with the perfect logic of the system, but which, when once introduced, become "material," so that an issue is formed upon them by a general or a specific denial. The instance just mentioned, of an allegation of non-payment in the complaint met by a denial in the answer, is a familiar example of such averments, material, although not necessary.

§ 668. It is an elementary doctrine of pleading under the new system, that only the *issuable* facts—that is, the conclusions of fact which are essential to the existence of the cause of action, or upon which the right to relief wholly or partially depends in equitable suits—are material, and are therefore put in issue by the denial; and the converse of the proposition is true, that the averments of mere evidentiary facts, if inserted in the pleading, are not thus controverted. Although this doctrine is elementary, and appears so simple in the statement, it is nevertheless sometimes exceedingly difficult of application in practice; and the difficulty is enhanced by the frequent inconsistencies of courts in dealing with it. While the general principle, as just stated, is constantly affirmed, yet there are numerous instances of particular causes of action in which the plaintiffs are required to

Ind. 396; Norris v. Amos, 15 Ind. 865; 856; Ammerman v. Crosby, 28 Ind. 451; Hawkins v. Borland, 14 Cal. 418; Goddard v. Fulton, 21 Cal. 430; City of v. First Univ. Soc., 68 Barb. 610, 616; Cat-Evansville v. Evans, 87 Ind. 229, 236; Hin v. Gunter, 1 Duer, 258, 265; Robinson v. Hier v. Grant, 47 N. Y. 278; Schaus v. Frost, 14 Barb. 536, 541; Texier v. Gouin, Manhattan Gas-Light Co., 14 Abb. Pr. 5 Duer, 889, 891; Dyson v. Ream, 9 Iowa, (n. s.) 371; Hunter v. Mathis, 40 Ind. 51; Scheer v. Keown, 34 Wisc. 349, 356.

set out in detail matter which is plainly evidentiary, and which is only of value as leading the mind to a conviction that the final or issuable fact, which is one necessary element of the right of action, exists. In other words, the courts have often, while dealing with particular cases, violated the elementary principle which applies, or should apply, to all cases ; and the result is confusion and uncertainty. It is possible, however, to distinguish between issuable, material facts, and evidentiary facts, by an unfailing criterion. In all particular instances of the same cause of action based upon the same circumstances, — that is, arising from the same primary right in the plaintiff, broken by the same delict or wrong on the part of the defendant, — the material or issuable facts which are the essential elements of the right of action must be the same: immaterial circumstances, the time, place, amounts, values, extent of damages, parties, and the like, will be different ; but the substantial elements of the cause of action, the facts which constitute it, must in every instance of the same species be the same. On the other hand, the evidentiary matter, the mass of subordinate facts and circumstances which must be actually proved, and from which the above-described essential elements result as inferences more or less direct, may vary with each particular instance of the same species of cause of action. The former class of facts are material, issuable, and, when the theory of pleading in legal actions is strictly observed, they alone should be averred, and they alone should be treated as put in issue by the denials, general or specific: the second class of facts — the proper evidentiary matter — should not be pleaded, and, if improperly averred, should not be regarded as put in issue by the denials of the defendant. This is the true theory, and is again and again commended by the courts ; but, at the same time, it is constantly violated by the same courts in their requirements in respect to the pleading in certain species of causes of action. Another source of difficulty in applying the elementary doctrine is found in the circumstance, that not infrequently the material, issuable fact which must be averred, and which is put in issue, is identical with the fact which must be actually given in evidence. In respect of such matters there are no steps and grades, and processes of combination and deduction, by which the issuable fact alleged is inferred from the evidentiary fact proved. The two are one and the same ; and thus matter which is truly evidence

must in such case be alleged, and matter which is the proper subject of allegation must be directly given in evidence.

§ 669. Another and the final element which should belong to the averments in the complaint, in order that an issue may be raised thereon by the denial, is, that they must be of fact, and not of law. This particular topic has already been treated of in a former subdivision of the present section. The reformed system of pleading, unlike that of the common law, authorizes no issues to be raised by allegations of legal conclusions, and denials of the same. Although there are traces to be found in some of the cases of the ancient forms of averment in *indebitatus assumpsit* and in *debt*, and of answers resembling the plea of *nil debet*, yet all the decisions of present authority unite in theoretically condemning such a mode of pleading. I need not, however, dwell upon this particular rule, nor again refer to cases which have been so recently cited. An allegation of law in the plaintiff's pleading is not controverted by the defendant's denial: no issue is formed thereby under which evidence can be admitted from either party.

§ 670. *Second. The General Nature of the Evidence which may be admitted, and the Defences which may be proved, under the Denials of the Answer.* The judicial opinions quoted under the preceding head sufficiently establish the principle which controls all the questions embraced under the present, and the cases to be cited in the following one will illustrate the application of that principle. In fact, it is so intimately bound up with the subject last discussed, that it has already been stated and explained. I shall, however, recapitulate and restate this fundamental doctrine. The material allegations of the complaint or petition, when denied either generally or specifically, determine in each case what evidence and what defences may be given and established by the defendant. It is impossible to say of any class of cases, that such or such evidence can or cannot be offered as a matter of certain rule, or that such or such a defence can or cannot be set up. As the plaintiff is bound by no inflexible rule as to the form of his pleading, and as to the averments he may choose to introduce into it, so he can widen or contract within distant extremes the extent and nature of the evidence and defences which may be interposed by the defendant under a denial.¹ As the denial puts

¹ See *Chicago, &c. R. R. v. West*, 87 Ind, 211, 215.

in issue all the material allegations of fact made by the plaintiff, whether originally necessary or not, he is at liberty to introduce all and any legal evidence which tends to sustain those allegations. On the other hand, under the same issue, the defendant is entitled to offer any evidence which tends to contradict that of the plaintiff, and to deny, disprove, and overthrow his material averments of fact. This is the fundamental and most comprehensive doctrine of pleading embraced in the new procedure, and it of course determines the nature of the defences which may be set up under a general denial. It is to be observed — although the remark is perhaps unnecessary — that the defendant may in this manner attack any material allegation of fact, and thus, if possible, defeat the recovery, while the others are left unanswered or unassailed.

§ 671. As the allegations of the complaint or petition controverted by the denials of the answer determine the nature and extent of the evidence admissible under such denials, it follows that this evidence may be sometimes negative and sometimes affirmative. Herein lies the source of much confusion and uncertainty as to the character of the defendant's proofs and defences, and as to their admissibility under the general denial. Evidence in its nature affirmative is often confounded with defences which are essentially affirmative and in avoidance of the plaintiff's cause of action, and is therefore mistakenly regarded as new matter requiring to be specially pleaded, although its effect upon the issues is strictly negative, and it is entirely admissible under an answer of denial. In other words, in order that evidence may be proved under a denial, it need not be in its own nature negative: affirmative evidence may often be used to contradict an allegation of the complaint, and may therefore be proved to maintain the negative issue raised by the defendant's denials. One or two familiar examples will sufficiently illustrate this proposition. In certain actions, property in the plaintiff, in respect of the goods which are the subject-matter of the controversy, is an essential element of his claim. His complaint, therefore, avers property in himself: the allegation is material, and is, of course, put in issue by the general or specific denial. To maintain this issue on his part, the plaintiff may give evidence tending to show that he is the absolute owner, or has the requisite qualified property. The defendant may controvert this fact in two modes. He may simply

contradict and destroy the effect of the plaintiff's proofs, and in this purely negative manner procure, if possible, a decision in his own favor upon this issue. The result would be a defeat of the plaintiff's recovery by his failure to maintain the averment of his pleading : but the jury or court would not be called upon to find that the property was in any other person ; the decision would simply be, that the plaintiff had not shown it to be in himself. On the other hand, the defendant, not attempting *directly* to deny the testimony of the plaintiff's witnesses, and to overpower its effect by *directly* contradictory proofs, may introduce evidence tending to show that the property in the goods is, in fact, in a third person. This evidence, if convincing, would defeat the plaintiff's recovery. It would be affirmative in its *direct* nature ; but its ultimate effect, in the trial of the issue raised by the answer, would be to deny the truth of the plaintiff's averment. Such evidence, although immediately affirmative, would still, for the purpose of determining the issue presented by the pleadings, be negative. Again : in an action on a promissory note against the maker or indorser, the complaint might allege title in the plaintiff, and the fact that he was the owner and holder thereof. The answer of denial would put this averment in issue, as it would be material, and its truth essential to the recovery. Proof by the defendant, that, prior to the commencement of the action, the plaintiff had assigned the note to a third person, would be affirmative in its immediate nature, but negative in its effect upon the issue ; for it would controvert the truth of the plaintiff's allegation. Cases cited under the next subdivision hold that the evidence which I have thus described in both of these examples is admissible under the general denial.

§ 672. The theory of the general denial is completed by considering what evidence cannot be given, and what defences cannot be set up, under it. This subject will be discussed at large in the following section ; but some reference to it is appropriate in the present connection. The codes divide defences into denials and new matter. New matter must be specially pleaded. Defences at the common law were separated into traverses general and special, and pleas by way of confession and avoidance. The general traverses were the general issues, and special traverses were denials of some particular allegation. The common-law distinction between these classes of defences was generally stated

by the text-writers as follows: The general issue, when used in accordance with the original theory in those actions, which admitted its full efficacy, put in issue the entire cause of action, and under it the defendant was permitted to offer any evidence and set up any defence which showed that the right of action *never, in fact, existed*. The plea by way of confession and avoidance, on the other hand, did not deny the facts from which the cause of action arose. It admitted or "confessed" that a cause of action once existed as averred, and set up other and subsequently occurring facts which showed that the right *after* it had occurred had been in some manner discharged, satisfied, or defeated. Is it possible to draw the same distinction between the general denial and the new matter of the code? I answer, It is not. Such a distinction, although correct in many instances, is not true absolutely. One reason for this is, that the plaintiff may so frame his complaint or petition, may insert in it allegations of such a sort, that a general denial will admit proof of facts which would be strictly matter by way of confession and avoidance under the former procedure. Certain passages in judicial opinions which have identified the "new matter" of the codes with the pleas by way of confession and avoidance of the common law, are, therefore, inaccurate: they were written by their authors in forgetfulness of the inherent difference between the fixed forms of the common-law declarations, and the varying forms of the complaints and petitions which may properly, though not perhaps scientifically, be used under the new system. To illustrate: Payment after breach of a contract, and therefore after a cause of action arose, is certainly matter by way of confession and avoidance; and yet a complaint may be so drawn that payment will not be new matter, but will be provable under a general denial. Other examples might be given; but this single one suffices.

§ 673. The result is, that the new matter of the code does not, like the matter in confession and avoidance of the common law, depend upon *the essential nature of the cause of action and of the defence*, but, like the effect of the general denial, it depends primarily upon *the nature of the material allegations which are embraced in the complaint*. Any facts which tend to disprove some one of these allegations may be given in evidence under the denial; any fact which does not thus directly tend to disprove

some one or more of these allegations cannot be given in evidence under the denial. It follows, that if such fact is in itself a defence, or, in combination with others, aids in establishing a defence, this defence must be based upon the assumption, that, so far as it is concerned, all the material allegations made by the plaintiff are either admitted or proven to be true. The facts which constitute or aid in constituting such a defence are "new matter." In this respect the new matter of the codes is analogous to the pleas by way of confession and avoidance of the common law, since it does, in truth, confess and avoid. The two definitions may now be given, and their contrast will be plain. A plea by way of confession and avoidance *admitted that the cause of action alleged did once exist*, and averred subsequent facts which operated to discharge or satisfy it. The new matter of the codes *admits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein which destroy the right of action, and defeat a recovery*. To sum up these conclusions, the classification of and distinction between defences at the common law depended upon the intrinsic, essential nature of the causes of action and of the defences. The analogous classification and distinction between defences admissible under a denial, and those which are new matter, in the new procedure, depend primarily upon the structure of the complaint or petition, and the material averments of fact which it contains. All facts which directly tend to disprove any one or more of these averments may be offered under the general denial: all facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defence independently of them, cannot be offered under the denial; they are new matter, and must be specially pleaded. I shall now apply these general principles to some particular instances.

§ 674. *Third. Some Particular Defences which have been held Admissible under the General Denial.* I shall in this subdivision, classify and discuss only those cases in which defences have been held *admissible*: those which have been pronounced inadmissible, for the reason that they fell within the denomination of "new matter," will be given in the next succeeding section. In an action by an attorney and counsellor to recover compensation for professional services, the complaint stating the retainer, the services and their value, and the answer being a general denial, the

plaintiff proved the services, and gave evidence showing their reasonable value. It was held that the defendant might, under his denial, show that the services were rendered upon a special agreement to the effect that the plaintiff would look to the recovery of costs from the adverse party as his sole mode of compensation, and would make no personal claim against the defendant.¹ And in a similar action under the same answer the defendant may prove the plaintiff's negligence and want of skill, by which the value of the services was diminished or destroyed.² In general, in actions to recover compensation for work and labor upon a *quantum meruit*, the defendants may, under the general denial, prove that the work was negligently or unskilfully done, and thus contest its value;³ and may prove that the plaintiff had assigned and transferred the demand before suit brought, for this controverts the defendant's indebtedness to him.⁴

§ 675. In actions for injuries to person or property alleged to have resulted from the defendant's negligence, he may prove under a general denial that the wrong was caused by the negligence of third persons not agents of the defendant, and for whom he was not responsible;⁵ or may prove contributory negligence of the plaintiff.⁶ In accordance with the principle of these

¹ Schermerhorn v. Van Allen, 18 Barb. 29, per Parker J.: "The evidence was improperly excluded. Under a general allegation of indebtedness, the plaintiff had proved certain services rendered and their value. It was surely competent for the defendant, under a denial of such indebtedness, to prove that he never incurred or owed the debt. He had a right to prove that the services were rendered as a gratuity, or that the plaintiff himself had fixed a less price for their value than he claimed to recover. The services being proved, the defendant might show that they were rendered, not for him, but on the credit of some other person, or that the plaintiff himself undertook to run the risk of the litigation. It was not an attempt to show an extinguishment of the indebtedness by payment, release, or otherwise; but it was an offer to show that such indebtedness never existed. The defendant was at liberty to prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed."

² Bridges v. Paige, 13 Cal. 640, 641.

³ Raymond v. Richardson, 4 E. D. Smith, 171. But under a mere denial of the value, the defendant cannot show that the services were not rendered. Van Dyke v. Maguire, 57 N. Y. 429.

⁴ Wetmore v. San Francisco, 44 Cal. 294, 299. And in an action for goods sold and delivered, the defendant may show that the plaintiff acted as agent for another person, whose name was disclosed, and who was the actual vendor. Merritt v. Briggs, 57 N. Y. 651.

⁵ Schular v. Hudson River R. R., 38 Barb. 653; Schaus v. Manhattan Gas-Light Co., 14 Abb. Pr. x. s. 371; Jackson v. Feather River, &c. Co., 14 Cal. 18; Adams Ex. Co. v. Darnell, 31 Ind. 20. In this case, proof that the goods were stolen was admitted in an action against a common carrier.

⁶ Schaus v. Manhattan Gas Co., 14 Abb. Pr. x. s. 371; New Haven, &c. Co. v. Quintard, 6 Abb. Pr. x. s. 128; Indianapolis, &c. R.R. v. Rutherford, 29 Ind. 82; Jeffersonville, &c. R. R. v. Dunlap, 29 Ind.

decisions, the defence of *non superior* is always admissible under a general denial of complaints which allege the commission of injuries by means of defendant's servants, employees, or agents.

§ 676. In an action upon a promissory note or other security, the defendant may under the general denial show an assignment of the thing in action to a third person before the suit was commenced, since this directly controverts the averment of title in the plaintiff;¹ and where the note is non-negotiable, a want of consideration may be showed.² The general denial to a complaint in the ordinary form, for goods alleged to have been sold and delivered by the plaintiff, admits the defence that a third person who actually made the sale was himself the owner of the goods, and was not acting in the transaction as agent for the plaintiff; for this proof contradicts the allegation of a sale by the plaintiff;³ and that the person who actually bought the goods in the name of the defendant was not the latter's agent, but that his prior authority had been revoked, and the plaintiff had been notified thereof; for this proof contradicts the allegation of a sale to the defendant.⁴

§ 677. In an action for the conversion of chattels, the complaint of course averring property in the plaintiff, the general denial permits the defendant to show that the property is not in the plaintiff;⁵ as, for example, by proving that a third person is

426; *Hathaway v. Toledo, &c. R. R.*, 46 Ind. 25, 27. This decision is placed upon the ground that in Indiana the plaintiff must allege and prove the absence of negligence on his part.

¹ *Andrews v. Bond*, 16 Barb. 683. And see *Wetmore v. San Francisco*, 44 Cal. 294, 299. The exact contrary is held in *Brett v. First Univ. Soc.*, 68 Barb. 610, 618, per Leonard J. The opinion in this case is, however, manifestly incorrect. Under the denial of "execution" in an action on a note or other written contract, the defendant may prove that his signature was obtained by fraud, *Corby v. Weddle*, 57 Mo. 452, 459; or that the instrument was not delivered, *Fisher v. Hamilton*, 48 Ind. 239. But see *Dunning v. Rumbaugh*, 36 Iowa, 566, 568. In an action upon an account stated for services, the defendant cannot, under the general denial, attack any of the items in the account, *Warner v. Myrick*, 16 Minn. 91.

The defence of alteration cannot be shown under the general denial in an action upon a written contract, *Boomer v. Koon*, 6 N. Y. S. C. 645.

² *Evans v. Williams*, 60 Barb. 346; *Bondurant v. Bladen*, 19 Ind. 160; *Butler v. Edgerton*, 15 Ind. 15. But not when the consideration is presumed, as in a sealed instrument or negotiable paper, *Dubois v. Hermance*, 56 N. Y. 673, 674; *Eldridge v. Mather*, 2 N. Y. 157; *Weaver v. Barden*, 49 N. Y. 286.

³ *Hawkins v. Borland*, 14 Cal. 413; and see *Ferguson v. Ramsey*, 41 Ind. 511, 513.

⁴ *Hier v. Grant*, 47 N. Y. 278; and see *Day v. Wamsley*, 83 Ind. 145, in which the defence was admitted that the goods were sold to defendant's wife, who had left him without cause, against his consent, and without his knowledge.

⁵ *Robinson v. Frost*, 14 Barb. 536.

owner of the goods either by an absolute or qualified title.¹ This latter proposition is, however, denied by some of the cases, which hold that the defence of property in a third person, or in the defendant, must be specially pleaded.² Under a general denial in the same action, or a specific denial of the conversion, any facts may be proved in defence which go to show that there was no conversion; as, for example, that the goods were lost without fault of the defendant,³ or were taken under an execution against the plaintiff.⁴

§ 678. When the action is brought to recover possession of goods, the complaint alleging title or right of possession in the plaintiff, the defendant may, under the general denial, introduce evidence to show that the plaintiff is not the owner nor entitled to possession of the chattels,⁵ but cannot show that the plaintiff's title is fraudulent and void as against his creditors.⁶ Nor can the defendant in such action, when the record presents the same issue, justify as sheriff under process against A., and assert that the goods in controversy were the property of A. fraudulently transferred to the plaintiff: this defence is new matter, and must be pleaded.⁷

§ 679. In an action to recover possession of land, if the complaint is in the usual form, merely averring that the plaintiff is owner in fee of the premises described and entitled to their possession, and that the defendant unlawfully withholds the same, the general denial admits proofs of any thing that tends to defeat the title which the plaintiff attempts to establish on the trial.⁸

¹ *Davis v. Hoppock*, 6 Duer, 254. He may show title in himself or in a third person, *Sparks v. Heritage*, 45 Ind. 66; *Kennedy v. Shaw*, 88 Ind. 474; *Farmer v. Calvert*, 44 Ind. 209, 212; *Thompson v. Sweetser*, 48 Ind. 312; *Davis v. Warfield*, 38 Ind. 461. See also *Jones v. Rahilly*, 16 Minn. 320, 325.

² *Dyson v. Ream*, 9 Iowa, 51; *Patterson v. Clark*, 20 Iowa, 429. The doctrine of these cases is clearly opposed to the true theory of the general denial.

³ *Willard v. Giles*, 24 Wisc. 319, 324.

⁴ *McGrew v. Armstrong*, 5 Kans. 284; or that the goods were taken with the plaintiff's consent, *Wallace v. Robb*, 87 Iowa, 192, 195; and the defendant in such action may prove any facts in reduction of damages; as, for instance, that the maker

was insolvent in an action for the conversion of a note made by a third person, and owned by the plaintiff, *Booth v. Powers*, 56 N. Y. 22, 27, 31, 33; *Quin v. Lloyd*, 41 N. Y. 349.

⁵ *Caldwell v. Bruggerman*, 4 Minn. 270; *Woodworth v. Knowlton*, 22 Cal. 164. In this case, defendant proved that the goods were the property of a third person. See also *Sparks v. Heritage*, 45 Ind. 66; *Kennedy v. Shaw*, 88 Ind. 474; *Farmer v. Calvert*, 44 Ind. 209, 212; *Thompson v. Sweetser*, 48 Ind. 312.

⁶ *Frisbee v. Langworthy*, 11 Wisc. 375.

⁷ *Glazer v. Clift*, 10 Cal. 303.

⁸ *Lain v. Shepardson*, 28 Wisc. 224, 228, per Paine J.: "Under such a complaint, the plaintiff is allowed to show any title he can; and, from the necessities

In some States the defence of the Statute of Limitations may even be relied upon in this action under a general denial;¹ but cannot be in the other States, whose codes expressly require the statute to be pleaded.² An equitable defence to the action must, however, as it seems, be specially pleaded;³ and the defence that a deed to the plaintiff absolute on its face, under which he claims title, is only a mortgage.⁴

§ 680. In an action to recover damages for a malicious prosecution, the complaint alleging malice and the want of a probable cause, the general denial puts these averments in issue, and admits any evidence going to show a want of malice and the existence of a probable cause; as, for example, when the complaint charged that the defendant wrongfully procured the plaintiff to be indicted, proof on the part of the defendant that he was a grand juror, and that all the acts complained of were done by him in that capacity, was held proper.⁵ The same principle must apply to all cases in which malice is an essential ingredient in the right of action, and is alleged in the complaint or petition: all facts tending to disprove the malice are clearly admissible under the denial.

§ 681. When the general denial is pleaded in an action to compel the specific performance of a contract to convey land, it is

of the case, the defendant, under a mere denial, must be allowed to prove any thing tending to defeat the title which the plaintiff attempts to establish. He cannot be bound to allege specific objections to a title which the complaint does not disclose, and which he may have no knowledge of until it is revealed by the evidence at the trial." *Mather v. Hutchinson*, 25 Wisc. 27; *Miles v. Lingerman*, 24 Ind. 385; *Marshall v. Shafter*, 32 Cal. 176; the defendant may prove title in himself, and an allegation to that effect in the answer is not new matter; *Bruck v. Tucker*, 42 Cal. 348, 351; *Bledsoe v. Simms*, 53 Mo. 305, 307. In several States, by virtue of the statute, every defence, legal or equitable, may be proved under the general denial, *Vanduyne v. Hepner*, 45 Ind. 589, 591; *Franklin v. Kelley*, 2 Neb. 79, 118-115 (fraud).

¹ *Nelson v. Brodback*, 44 Mo. 596; *Bledsoe v. Simms*, 53 Mo. 305, 307.

² *Orton v. Noonan*, 25 Wisc. 672. A

defence arising after the commencement of the action cannot be proved, but must be set up by a supplemental answer. *McLane v. Bovee*, 35 Wisc. 27, 34.

³ *Stewart v. Hoag*, 12 Ohio St. 623; *Lombard v. Cowham*, 84 Wisc. 486, 491. The court, in the last case, held that, when the deed under which the plaintiff claims is fraudulent and void, that defence may be proved under the general denial, because it controverts the plaintiff's legal title. To this effect is *Brown v. Freed*, 48 Ind. 253, 254-257, and cases cited.

⁴ *Davenport v. Turpin*, 43 Cal. 597; *Hughes v. Davis*, 40 Cal. 117.

⁵ *Ammerman v. Crosby*, 23 Ind. 451; *Hunter v. Mathis*, 40 Ind. 356; *Rost v. Harris*, 12 Abb. Pr. 446; *Radde v. Ruckgaber*, 3 Duer, 684; *Simpson v. McArthur*, 16 Abb. Pr. 302 (n.); *Levy v. Brannan*, 39 Cal. 485; *Trogden v. Deckard*, 45 Ind. 572; but see *Scheer v. Keown*, 34 Wisc. 349, an action for false arrest and imprisonment.

held in some cases that the defence of the Statute of Frauds may be relied upon; for the answer puts the existence of the contract in issue:¹ other cases, however, hold the contrary, and require the statute to be pleaded.² And the Statute of Limitations may be set up under a general denial in the same action, whenever it is not expressly required by the codes, as in certain States, to be pleaded.³

§ 682. When the complaint in an action upon a covenant of warranty, contained in a deed of land to the plaintiff, alleged the conveyance, the covenant, and a breach thereof by means of an outstanding paramount title and a recovery on the same, the general denial put all these averments in issue, and enabled the defendant to prove any facts going to show that there was no such paramount title.⁴ In an action upon a judgment recovered in another State, the complaint set out the recovery of the judgment, and all the other allegations necessary to constitute the cause of action. The defendant pleaded (1) the general denial; (2) that there was no such record; (3) that the judgment was obtained without any notice given to the defendant, without service of process on him or appearance by him, he being all the time a non-resident of the State in which the judgment was recovered. All the matters alleged in these two special defences were, it was held, embraced within the general denial, and could be proved under it: the defences themselves, according to the well-settled practice in Indiana, were struck out on motion, because they were equivalent to the general denial, and redundant.⁵

¹ *Hook v. Turner*, 22 Mo. 383; *Wildbahn v. Robidoux*, 11 Mo. 659.

² *Livesey v. Livesey*, 80 Ind. 398; *Osborne v. Endicott*, 6 Cal. 149.

³ *Wiswell v. Tefft*, 5 Kans. 263.

⁴ *Rhode v. Green*, 26 Ind. 83. In a creditor's suit to set aside the debtor's fraudulent transfer of land, the grantee may prove, under the general denial, that the land was a homestead, for this rebuts the alleged fraud charged by the plaintiff. *Hibben v. Soyer*, 33 Wisc. 319, 322; also any facts showing absence of fraud, *Summers v. Hoover*, 42 Ind. 153, 156.

⁵ *Westcott v. Brown*, 13 Ind. 83. *Davison J.*, after saying that the second

defence was equivalent to *nul tiel record*, proceeded: "The code points out no such distinctive plea, but, in lieu of the general issue as it stood at the common law, simply authorizes a general or specific denial. Here the defence in question controverts the entire cause of action, and therefore amounts to a full denial of the complaint; and if, as such denial, it stood alone, it might be sustained. But in this instance it is not well pleaded, because the defendant, having in his first paragraph pleaded the general denial, cannot be allowed in another paragraph to plead what is in effect the same defence."

X. *Some Special Statutory Rules.*

§ 683. This discussion will be ended by a brief reference to some special statutory rules, prescribing the effect and operation of denials in certain cases, which have been adopted in various States. These rules do not belong to the general theory of pleading embodied in the new system; they rather break the symmetry of that theory; but as they are practically important, they cannot be passed by without notice. In New York, a statute, general in its terms, requires the corporate existence of the plaintiff in an action by a corporation to be specifically denied if at all in the answer, and the fact of its existence is not put in issue by the general denial;¹ but this provision, it is held, applies only to domestic corporations, so that a foreign corporation when suing must establish its existence when the same is traversed by a general denial.² In Indiana a sworn answer is made necessary to put in issue the legal existence of alleged corporations in actions brought by them; but a general denial verified complies with this statutory requirement, and compels the plaintiff to prove its corporate character.³ In Wisconsin, an answer denying the partnership of the plaintiffs in an action by a firm must be verified, or it forms no issue. An unverified denial, therefore, either general or specific, admits the partnership as averred.⁴

§ 684. In Indiana, in actions upon written instruments against the original parties, makers, indorsers, acceptors, obligors, and the like, an unsworn general denial puts in issue only the *existence* of the writing, and requires its production; but does not put in issue its *execution*, and therefore admits no evidence tending to dispute the signature of the defendant or any other facts included within the execution. If verified, the denial puts in issue both the execution and the existence.⁵ The rule is differ-

¹ 2 R. S. 457, 458, § 3.

² Waterville Man. Co. v. Bryan, 14 Barb. 182.

³ Chance v. Indianapolis, &c. Road Co., 82 Ind. 472, disapproving a contrary doctrine in Cicero, &c. Co. v. Craighead, 28 Ind. 274, and approving West v. Crawfordsville, &c. Co., 19 Ind. 242; Williams v. Franklin, &c. Assoc., 26 Ind. 810; Adams Ex. Co. v. Hill, 43 Ind. 157; Indianapolis F. & M Co. v. Herkimer, 46 Ind. 142, 144.

A similar statute in Wisconsin, it is held, applies to both foreign and domestic corporations, R. S. ch. 148, §§ 3, 11; Williams Mower, &c. Co. v. Smith, 33 Wisc. 530; Central Bank v. Knowlton, 12 Wisc. 624.

⁴ Statute of 1858, ch. 187, § 98; Fisk v. Tank, 12 Wisc. 276, 301; Martin v. Am. Ex. Co., 19 Wisc. 336.

⁵ 2 R. S., p. 44, § 80; Stebbins v. Goldthwaite, 81 Ind. 159; Evans v. South-

ent, however, in actions against the executors or administrators of deceased parties to written instruments: the unverified general denial pleaded by them raises a complete issue.¹ An unverified general denial also admits the plaintiff's legal capacity to sue in Indiana.² A statute of Iowa enacts, that, in actions or defences on written instruments, "the signature or indorsement thereto shall be deemed *genuine* and admitted, unless the party whose signature it purports to be shall deny the same under oath in the pleading." In an action upon a promissory note against the maker, the defendant pleaded an unverified general denial, and under it insisted as a defence that he did not sign the writing *as a note*, but executed it with the supposition that it was a simple receipt. This defence being objected to as inadmissible, the court held that the statute referred only to the *genuineness* of the signature, and did not prohibit the defendant from showing that he did not execute such a contract as the one in suit, but executed an entirely different instrument, for example, a receipt, and that the same had been altered into a note.³ In another case upon a note the petition set it out *in hæc verba*, averring that it was executed by the defendant. The answer was verified, but simply denied knowledge or information sufficient to form a belief whether the allegations of the petition were true. This form of verified denial, it was held, did not comply with the requirements of the statute in question, and raised no issue in respect of the signature.⁴

§ 685. The general denial, at least when verified, cannot be struck out as sham on motion. In accordance with the settled rule of the former procedure, the general issue could not be struck out for such cause; and in this respect the general denial is its equivalent. "It gives the defendant the same right to require the plaintiff to establish by proof all the material facts

ern Turnp. Co., 18 Ind. 101; Price v. Grand Rapids, &c. R. R., 18 Ind. 187; Hicks v. Reigle, 32 Ind. 860.

¹ Cawood's Administrator v. Lee, 32 Ind. 44; Riser v. Snoddy, 7 Ind. 442; Mahon's Administrator v. Sawyer, 18 Ind. 78.

² Downs v. McCombs, 16 Ind. 211; Jones v. Cin. Type Foundry, 14 Ind. 89; Heaston v. Cincinnati, &c. R. R., 16 Ind. 275; Harrison v. Martinsville, &c. R. R., 16 Ind. 505.

³ Lake v. Cruikshank, 31 Iowa, 395.

⁴ Hall v. Aetna Man. Co., 30 Iowa, 215, 217, 218. See Lyon v. Bunn, 6 Iowa, 48, for a construction of a prior statute somewhat different in its language from the one quoted in the text. See also State v. Chamberlin, 54 Mo. 338, that in actions upon written instruments the denial of their execution must be under oath in Missouri.

necessary to show his right to a recovery as was given by that plea [the general issue]."¹ The same rule applies to a denial, general in form, of certain specified allegations constituting a part of the complaint, and is applicable as well to equitable as to legal actions,² and to all partial denials,³ and is not restricted to those which are verified.⁴

SECTION FOURTH.

THE DEFENCE OF NEW MATTER.

§ 686. Much of what might properly be included in this section has already been necessarily dwelt upon in discussing the defence of denials. The two subjects so correlate and support each other, that the one cannot be explained in full without, to some extent, explaining the other also. I shall not repeat the propositions and definitions given in the last section, but shall content myself with adding examples and illustrations drawn from decided cases. The subject-matter of this section will be distributed into three subdivisions: I. How defences of new matter should be pleaded; II. What is new matter in general, with a particular reference to defences in mitigation and those in abatement; and, III. Some particular examples of new matter classified and arranged.

I. *How Defences of New Matter should be pleaded.*

§ 687. A denial when properly pleaded does not *state* any facts; it simply *denies* facts.⁵ A defence of new matter, on the other hand, does not deny any facts; it assumes the averments of the complaint or petition to be true; and under the ancient system a plea of confession and avoidance must *give color* to these averments, or it would be fatally defective. The "giving color" was simply the absence of any denials, and the express or silent admission that the declaration, as far as it went, told the truth.⁶

¹ *Wayland v. Tysen*, 45 N. Y. 281, 282.

² *Thompson v. Erie R. R.*, 45 N. Y. 468, 472.

³ *Claffin v. Jaroslowski*, 64 Barb. 468.

⁴ *Brooks v. Chilton*, 6 Cal. 640.

⁵ See *Town of Venice v. Breed*, 65 Barb. 597, 608, per Mullin J., for a statement of the comparative effects of denials and of new matter in raising issues.

⁶ Under the new procedure, in every defence of new matter there should be,

The defence of new matter consists, therefore, of facts, — positive facts ; and these should be averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint. The defence of new matter depends upon the existence of facts from which it results as truly as the cause of action results from other facts. The rule for setting forth the facts which constitute the defence is, therefore, the same as that for setting forth the facts which constitute the cause of action. In each case, all the material, issuable facts which make up the cause of action or the defence must be averred, while the detail of mere evidentiary matter should properly be left to be used as proofs at the trial. I need not further enlarge upon this proposition, but will illustrate it by a few judicial decisions. Thus it is a settled rule, that, when fraud is relied upon as a defence, a general allegation charging fraud or a fraudulent intent will not suffice: all the facts which the law requires as the elements of fraud, and all which are claimed to be the constituents of the fraud in the particular case, must be averred ; and their absence may destroy the intended effect of the pleading, and shut out all evidence in its support at the trial.¹

either expressly or by implication, a confession, that, but for such new matter, the action could be maintained ; the defence must contain no denial ; such denial should be pleaded in a separate defence, if at all, *Morgan v. Hawkeye Ins. Co.*, 87 Iowa, 859 ; *Anson v. Dwight*, 18 Iowa, 241. This is nothing more than the simple rule that two distinct defences should not be mingled together.

¹ *Jenkins v. Long*, 19 Ind. 28, 29, per *Frazer J.* : " At the common law, fraud could be given in evidence under the general issue, or under a general plea of fraud. But, under the code, fraud must be specially pleaded ; and the answer of fraud must contain all the elements necessary to be proved to make out the fraud : and these are, that the representation must go to a material fact ; must be made under such circumstances that the party had a right to rely on it ; and it must be false to a material extent." *Keller v. Johnson*, 11 Ind. 387. In an action on notes, a defence " that he was induced to execute the notes mentioned by the fraud, covin, and deceit of the," &c., was held bad on

demurrer. *Capuro v. Builders' Ins. Co.*, 39 Cal. 123 ; *Oroville, &c. R. R. v. Supervisors, &c.*, 87 Cal. 354 ; *Kent v. Snyder*, 80 Cal. 666 ; *Fankboner v. Fankboner*, 20 Ind. 62 ; *Ham v. Greve*, 34 Ind. 18, 21, a defence " that his signature was obtained by the fraud of the plaintiff," without stating any circumstances, was held a nullity. *Hale v. Walker*, 31 Iowa, 344, 355, a defence which simply stated that the contract in suit " was either false or fraudulently so written or so done by mistake," admitted no proof of fraud. " In order to admit evidence of fraud, there should, under our system of pleading, be at least a general statement of the facts constituting the fraud." *Lefler v. Field*, 52 N. Y. 621, action for the price of barley bargained and sold : answer, that the barley was bargained for by defendant's agent ; that he contracted to buy plaintiff's barley, provided it was merchantable ; that plaintiff represented it good, first quality, and merchantable ; that the agent relied on such representations ; that the barley was not merchantable, which fact was known to the

§ 688. Akin to the defence of fraud is that of duress: the facts constituting the duress must be stated, and a mere general averment will not suffice; as, for example, in a suit to foreclose a mortgage given by a married woman upon her own land, a defence that "she was induced by the coercion of her said husband to execute the said mortgage."¹ A defence of justification in an action for trespasses and other torts must by appropriate averments identify the wrongs complained of with the acts described in the answer and justified, or else it will fail of its purpose and be worthless.² In Indiana, the defence of a former recovery for the same cause of action between the same parties must set out the record of such former suit, or it will be insufficient and bad on demurrer.³ The following are some further illustrations of the general rule: A defence of jettison by a common carrier on the water should allege all the facts showing the jettison to have been necessary;⁴ a defence of usury must narrate all the particulars of the agreement and transaction;⁵ a defence of long-continued user or prescription should aver that the possession or user by the defendant was adverse;⁶ and the defence that the plaintiff is not the real party in interest must state all the facts which show that legal conclusion.⁷

§ 689. When the defendant sets out new matter which he relies upon, not as defensive merely, but as the basis of affirmative relief, either in the form of a strictly legal counterclaim or of an equitable cross-demand, he becomes in truth an *actor pro tanto*: his answer is to that extent equivalent to a cause of action

plaintiff. Although the plaintiff went to trial on this answer without prior objection, the Court of Appeals held it was worthless, since it omitted two essential elements of the fraud, — (1) the plaintiff's intent to deceive, and (2) that defendants were in fact deceived. See also *Cummings v. Thompson*, 18 Minn. 246, 256, in which the rule is given as follows: "A general statement of the matters of fact constituting the fraud is all that is required: it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge." *Dubois v. Hermance*, 56 N. Y. 673, 674; *Joest v. Williams*, 42 Ind. 565, 568; *Curry v. Keyser*, 30 Ind. 214; *Leighton v. Grant*, 20 Minn. 345, 354.

¹ *Richardson v. Hittle*, 31 Ind. 119; *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 580.

² *Gallimore v. Ammerman*, 89 Ind. 323; *Isley v. Huber*, 45 Ind. 421; *Boaz v. Tate*, 48 Ind. 60, 71.

³ *Norris v. Amos*, 15 Ind. 365; 2 R. S., p. 44, § 78.

⁴ *Bentley v. Bustard*, 16 B. Mon. 648.

⁵ *Manning v. Tyler*, 21 N. Y. 567, 568, and cases cited; *Gaston v. McLeran*, 3 Oreg. 389.

⁶ *White v. Spencer*, 14 N. Y. 247.

⁷ *Raymond v. Pritchard*, 24 Ind. 318, and cases cited; *Hereth v. Smith*, 38 Ind. 514, and cases cited; *Shafer v. Bronenberg*, 42 Ind. 89, 90.

asserted in a complaint or petition, and is to be governed by the same rules. It must aver all the material, issuable facts constituting the right of action in his favor, and must demand the relief legal or equitable which is sought to be obtained from the plaintiff.¹ The foregoing cases are given as illustrations and examples of the general doctrine, and not as exhaustive of its scope and application. The rule applies to all defences of new matter. The material, issuable facts which constitute the defence must be averred, so that its sufficiency in law may fully appear on the record: the facts themselves, and not the legal conclusions from assumed facts, are to be stated.²

II. *The General Nature of New Matter; Defences in Mitigation of Damages, and in Abatement.*

§ 690. The cases quoted from in the preceding section to show the judicial definition of the general denial exhibit also the interpretation put by the courts upon the term "new matter;" and the decisions which will be cited in the next subdivision of this section will show how that interpretation has been applied in a great variety of particular instances. It would be a needless labor to repeat the extracts referred to, or the general discussion of the nature and properties of new matter. It is elementary that a defence of new matter should be pleaded; and as new matter must of necessity be a distinct defence from a denial, it follows that it cannot properly be associated or mingled up with denials general or specific in one paragraph or plea. For the same reason, each defence of new matter must necessarily be complete and single, as much so as each cause of action, and should be separately stated in a plea by itself. This subject will be treated of at large in a subsequent section.

§ 691. The overwhelming weight of judicial opinion has with almost complete unanimity agreed upon the principle which distinguishes denials from new matter, and determines the office

¹ *Rose v. Treadway*, 4 Nev. 455; *Hook v. Craighead*, 82 Mo. 405; *White v. Allen*, 8 Oreg. 108.

² *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435, 443, per *Wagner J.*; *State v. Cent. Pac. R. R.*, 9 Nev. 79, 87 (payment); *Pease v. Hannah*, 8 Oreg. 801

(defence in action to recover land); *Heaston v. Cincinnati, &c. R. R.*, 16 Ind. 275. But it was held in *Hunter v. McLaughlin*, 48 Ind. 38, 45, that the following was a sufficient averment of a want of consideration; that the notes "were given without any consideration whatever."

and function of each. The general denial puts in issue all the material averments of the complaint or petition, and permits the defendant to prove any and all facts which tend to negative those averments or some one or more of them. Whatever fact, if proved, would not thus tend to contradict some allegation of the plaintiff's first pleading, but would tend to establish some circumstance, transaction, or conclusion of fact, not inconsistent with the truth of all those allegations, is new matter. It is said to be "new," because it is not embraced within the statements of fact made by the plaintiff; it exists outside of the narrative which he has given; and proving it to be true *does not disprove a single averment of fact* in the complaint or petition, but merely prevents or destroys the legal conclusion as to the plaintiff's rights and the defendant's duties which would otherwise have resulted from all those averments admitted or proved to be true. Such is the nature of the new matter which cannot be presented by means of a denial, but must be specially pleaded, so that the plaintiff may be informed of its existence and of the use to be made of it by the defendant. Whether it is "new" in the sense described, must of necessity depend, and depend alone, upon the nature, extent, and variety of the material allegations which the plaintiff inserts in his pleading. I shall not repeat the observations upon this point contained in the preceding section, and simply remark, that the plaintiff may, by making unnecessary although material averments in his complaint or petition, greatly enlarge the scope of the general denial, and prevent those defensive facts from being in *his* case new matter, which in another case, and from the operation of a more scientific and correct mode of pleading, would clearly be new matter. The criterion under the code system is not, therefore, in *every* case, the intrinsic, essential nature of the defence itself proposed by the defendant: it is to be found rather in the frame of the complaint or petition, in the material statements of fact made by the plaintiff therein. It cannot then be said, for example, that "payment" is always new matter; for the plaintiff may so construct his complaint that facts showing payment will be directly contradictory of a material averment embraced within it, and therefore plainly admissible under the general denial. It is impossible for this reason to collect, arrange, and classify a mass of different defences, and say of them, as could be said under the old system, that they are all

necessarily by way of confession and avoidance, and therefore all of necessity "new matter."

§ 692. It follows from the foregoing discussion, that considering the office and function of the general denial, and the distinction between it and new matter, the latter *confesses and avoids all the material allegations of the complaint or petition*; that is, it admits all the material facts averred therein, and avoids their legal result by means of the additional facts which are relied upon as constituting the defence. A particular defence may therefore, when set up in answer to *one* complaint, be new matter, and require to be pleaded: the same kind of defence, when set up in answer to *another* complaint, may not be new matter, but may be proved under the general denial without being specially pleaded. Undoubtedly the defence of payment in its various phases is the one which most frequently assumes this double aspect; but the principle plainly applies to other defences, and is general. This description of new matter and the discussion of its nature will be so fully illustrated by the cases to be cited in the following subdivision of the present section, that none need now be quoted in support of the foregoing positions. There are, however, two special classes of defences, which, though embraced under the denomination of new matter, are so peculiar, and so radically different from all others of that name, that they require a separate mention, — defences in mitigation of damages, and defences in abatement.

§ 693. *Defences in Mitigation of Damages.* The theory of the common law in respect of full and partial defences has already been stated.¹ Each defence in bar by way of confession and avoidance must have been a complete answer to the whole cause of action. Facts which fell short of that result, but which constituted a partial answer, were not regarded as true "defences." As they did not defeat a recovery, but always allowed a judgment for at least nominal damages, the severe logic of the system did not suffer them to be pleaded separately in the form of a bar. This logic demanded a perfect issue upon the record, — an assertion on the one side, and a complete denial thereof on the other, — or else the record admitted the plaintiff's right to recover. If the defendant should plead facts which constituted a partial

¹ See *supra*, §§ 607, 608.

defence merely, there would be no issue, and the common-law devotion to logical *forms* could not admit such a violation of its theory. As the partial defences, if pleaded, would raise no issue, the rule was adopted that they should not be pleaded, but that the general issue should be interposed, and the facts constituting them should be given in evidence under that answer. Matters in mitigation are partial defences, and it became the settled doctrine of the former procedure that they were to be proved under the general issue. Mitigating circumstances were not confined to actions for torts, to "trespass," "case," or "trover:" they were possible and proper as well in actions upon contract, in "covenant" and "assumpsit." Part payment was of course such a circumstance; and even full payment might be proved in mitigation, reducing the plaintiff's recovery to nominal damages.¹

§ 694. The common-law logic does not control the forms of pleading and of the issues under the present system. The notion of a partial defence on the record, of an answer which does not go to the whole cause of action, is neither opposed to the spirit nor to the letter of the codes; on the contrary, it is in full harmony with the spirit, and seems to be demanded by the letter. The obvious intent of the system — the central conception — is not an observance of logical forms, but that the facts which constitute the plaintiff's cause of action, and the defendant's resistance thereto, shall be stated in a plain and concise manner, in ordinary language, without reference to any technical requirements of form or theory. The very primary design of the procedure is that the truth as it is between the parties must be first alleged, and then proved. The letter carries out this spirit, because it requires that the answer *must* contain (1) the denials, and (2) a statement of *any* new matter constituting a defence, and that the defendant may set forth as many defences as he shall have. No other clauses of the statute limit this general language, or restrict it to entire defences. From the nature of the case, when a complaint or petition is in an ordinary form, containing only the averments necessary to state the cause of action, facts in mitigation of damages must be new matter rather than

¹ For a full statement of these common-law doctrines, and their practical effect on the trial of causes, see the opinion of Selden J. in *McKyring v. Bull*, 16 N. Y. 304, *supra*, §§ 658, 659.

denials. It follows that the fair and obvious interpretation of the codes not only permits but requires that this class of defences, when they are new matter, should be pleaded. It is clearly contrary to the entire theory of the system that *any* new matter, however incomplete may be its effect upon the plaintiff's recovery, should be proved under a denial: there is not the slightest warrant for such a use to be made of the general denial, whatever may have been the function of the general issue in this respect. In interpreting the language of the codes, all the common-law notions as to the impossibility of pleading partial defences should be wholly rejected; for they were based upon reasons purely technical and arbitrary, — mere formulas of verbal logic without any *real* meaning. The statute should be construed in its own spirit as an independent creation, and not in the light of ancient dogmas which it was designed to supersede. I need not collate and compare the various provisions of the code bearing upon the question in order to establish the textual interpretation. Nothing can be added to the demonstration which Mr. Justice Seldon has worked out in the opinion already mentioned and quoted at length in the preceding section, and that opinion has not been and cannot be answered.¹

§ 695. On principle, then, all defences in mitigation of damages, when they consist of new matter, should be pleaded, and cannot be proved, under the general denial. How does the question stand upon authority? It is, of course, put at rest in New York by the decision of the tribunal of last resort in *McKyring v. Bull*.¹ The *ratio decidendi* of that case is universal in its application: it is not confined to the defence of payment; the argument embraces all instances of mitigation, for it is not based upon the particular nature of any defence, but upon an interpretation of the language used by the legislature. This decision has been followed by other courts and in other States, but the cases are not unanimous: in some, the ancient common-law dogmas have been appealed to and accepted as controlling. I will collect the more important of these adjudications. A defence in mitigation having been pleaded to an action for false arrest and imprisonment, the Supreme Court of New York, in denying a motion to strike out the answer, said: "It has been held in several cases that mitigating circumstances in actions of this nature

¹ *McKyring v. Bull*, 16 N. Y. 304. See *supra*, §§ 658, 659.

may be proved without being set up, if admissible in evidence at all. Whatever weight may be given to these authorities, I am inclined to think that the case of *Foland v. Johnson*,¹ which was decided by the general term of this district, settles the question in favor of the doctrine that mitigating circumstances may be set up by way of answer in a case like the present one."² In *Foland v. Johnson*,¹ which was an action for assault and battery and false imprisonment, it was held that a separate defence in mitigation was proper. *McKyring v. Bull* was distinctly recognized as overruling previous cases, and as laying down the universal rule of interpretation for all causes of action and defences. It had been said in several early New York cases that matter in mitigation cannot be pleaded, but must be proved under a general denial: these decisions were all pronounced before that made in *McKyring v. Bull*, and must therefore be considered as overruled.³ There is a dictum in *Travis v. Barger*,⁴ to the effect

¹ *Foland v. Johnson*, 16 Abb. Pr. 285, 239.

² *Beckett v. Lawrence*, 7 Abb. Pr. n. s. 408, 406.

³ *Salts v. Kip*, 5 Duer, 646 (Sp. Term); *Kneedler v. Sternbergh*, 10 How. Pr. 67 (Sp. Term); *Dunlap v. Snyder*, 17 Barb. 561; *Anonymous*, 8 How. Pr. 484 (Sp. Term); *Gilbert v. Rounds*, 14 How. Pr. 46; *Lane v. Gilbert*, 9 How. Pr. 150.

⁴ *Travis v. Barger*, 24 Barb. 614, 623, per Birdseye J. There are New York cases, however, subsequent to *McKyring v. Bull*, which utterly disregard it, and might be considered as overruling it, were it possible for a lower court, and a single judge quoting himself as authority, to overrule the decisions of a higher tribunal. In *Harter v. Crill*, 83 Barb. 283, per Morgan J., which was an action for criminal conversation, it was held that facts in mitigation could be proved under the general denial. *McKyring v. Bull* was mentioned, and its authority was denied because the mitigating circumstances did not constitute a defence. It was said that the section requiring new matter to be pleaded (§ 149 of the New York code) includes only those cases in which the facts to be alleged amount to a complete defence. In short, the entire argument, the whole course of reasoning approved by

the court of last resort, was disregarded. No analysis or comparison of other sections and passages bearing upon the question was made: the results reached by the Court of Appeals, after a most careful examination of the text of the statute aided by the light of experience, were overturned by a bare assertion. Finally, in *Tompkins v. Wadley*, 3 N. Y. S. C. 424, 430, per Morgan J., which was an action for the breach of a promise to marry, evidence in mitigation was held admissible under the general denial. The same judge again delivered the opinion, and cited *Harter v. Crill*, *Travis v. Barger*, 24 Barb. 614, 623, and *Kniffen v. McConnell*, 80 N. Y. 290, in support of his position, *McKyring v. Bull* not being mentioned. The two former cases have already been commented upon. In the head-note of *Kniffen v. McConnell*, the reporter states that "it seems matter in mitigation may be proved under the general denial;" but there is nothing in the opinion of the court which furnishes the slightest warrant for even that guarded statement. The doctrine of the text is therefore fully sustained by judicial authority in New York. The two opinions of Mr. Justice Morgan can hardly be regarded as overturning the judgment pronounced by the tribunal of final resort; and the argument of Mr.

that circumstances in mitigation may be proved under the general denial; but the facts did not call for any decision. The proposition was stated by the judge *arguendo*, and the opinion itself was prior to the announcement of the contrary doctrine by the Court of Appeals.

§ 696. In Indiana the common-law dogma is still adhered to. The rule as stated by the Supreme Court of that State is, that "matter in mitigation only cannot be specially pleaded or set up by way of answer, but may be given in evidence under the general denial. We know of no authority, either at common law or by statute, allowing matters in mitigation only, except in actions for libel and slander, to be specially pleaded or set up in the answer."¹ In Kentucky it would seem that a partial defence in mitigation should be pleaded.² The codes expressly authorize mitigating circumstances to be pleaded in actions for libel or slander.

§ 697. *Defences in Abatement.* At the common law, all pleas were divided into two general classes, — those "in bar" and those "in abatement." "Whenever the subject-matter of the defence is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded *in bar*; but matter which merely defeats the present proceeding, and does not show that the plaintiff is for ever concluded, should in general be pleaded *in abatement*."³ The most common defences in the present system analogous to the ancient pleas in abatement are those which set up want of jurisdiction in the court, or a *present* want of legal capacity in the plaintiff to sue, or a defect of parties, or the pendency of another action. There was a marked difference between these two classes of pleas at the common law, and certain special rules regulating the use of those in abatement. Among these rules, the following were important. A plea in abatement could not be joined with one in bar in answer to the same subject-matter; but the former must be pleaded by way of intro-

Justice Selden is certainly unanswered and unanswerable on principle. See, however, *O'Brien v. McCann*, 58 N. Y. 373, 376.

¹ *Smith v. Lisher*, 23 Ind. 500, 502, per Elliott J.; and see *Allis v. Nanson*, 41 Ind. 154, 157, 158, per Worden J.

² *Hackett v. Schad*, 3 Bush, 353, 355,

per Robertson J. Mitigating facts and circumstances must be pleaded in actions for libel or slander, and cannot be proved under a general denial, *Langton v. Hagerty*, 35 Wisc. 150, 161, 162; *Wilson v. Noonan*, 35 Wisc. 321, 343, 349. See *Desmond v. Brown*, 33 Iowa, 13.

³ 1 Ch. Pl. 446.

duction, and must be disposed of before a plea in bar could be interposed. As a consequence, the pleading a defence in bar waived all defences in abatement to the same matter. The judgments rendered upon the two classes of pleas were different: for the one simply dismissed *that* suit, and did not prevent the plaintiff from commencing another; while the other ended the judicial controversy in respect to the subject-matter involved.

§ 698. There are in the new procedure no such divisions and classes. Defences still exist of the same essential nature as those which were formerly set up by means of a plea in abatement, and a judgment thereon in favor of the defendant does not for ever bar the plaintiff from the further prosecution of his demand. They are governed, however, by the same rules of procedure that regulate all the other defences which may be relied upon by a defendant. There is no difference in the methods of pleading them, of trying them, or of adjudicating upon them: the only difference is in respect to the conclusive effects of the judgments rendered upon them. In other words, so far as concerns the manner of alleging and of trial, all distinctions between these two classes of defences have been abolished, and both have been placed in the same category.¹ All defences which are analogous to the ancient pleas in abatement—that is, all which are based upon the same facts—are evidently new matter: they cannot be proved under the general denial, but must be specially pleaded.

III. *Some Particular Defences of New Matter classified and arranged.*

§ 699. In all the following examples in which it has been held that the defences are new matter, it must be understood that the complaints or petitions were in the proper form, containing the allegations necessary to constitute the causes of action, and no more. When the plaintiff's pleadings deviated from this usual type, and were so framed that the defences could be admitted under the general denial, this fact will be particularly mentioned.

¹ *Stone's Administrator v. Powell*, 13 B. Mon. 342; *Sweet v. Tuttle*, 14 N. Y. 465, 468, per Comstock J. (defect of parties); *Gardner v. Clark*, 21 N. Y. 399 (pending of another action); *Mahew v. Robinson*, 10 How. Pr. 162 (defect of parties); *Bridge v. Payson*, 5 Sandf. 210 (defect of parties); *Freeman v. Carpenter*, 17 Wisc. 126 (pendency of another action); *Thompson v. Greenwood*, 28 Ind. 327; *Bond v. Wagner*, 28 Ind. 462.

§ 700. *Payment.* It is the settled rule, except perhaps in California, that when the complaint or petition is in the customary form, not averring the fact of non-payment in so distinct a manner that an issue would be raised upon it by a denial, the defence of payment is new matter, and must be pleaded as such.¹ When, however, the complaint or petition contains negative averments of non-payment, so that a traverse of them is in fact equivalent to an allegation of payment, an issue is made by the mere denial general or specific, which admits the defence of payment to be proved under it. This is not an exception to the foregoing rule; for an issue upon the very fact of payment is actually formed by such assertions and denials. The decided cases present some differences in respect to the form of the averment in the complaint or petition, which, by being traversed, permits the defence to be interposed; but the principle upon which they were decided is the same in all. In an action to recover for work and labor, the complaint stated the agreement, the performance of services at a stipulated price, and that on a certain day named the defendant "was indebted to the plaintiff in the sum of \$333, being the balance remaining due after sundry payments made by defendant to the plaintiff." The answer was a general denial. Evidence offered by the defendant to prove payments made by him on account, the New York Court of Appeals held, ought to have been admitted under this issue, distinguishing the case from *McKyring v. Bull* by reason of the peculiar averments in the complaint.² Where a complaint set out an indebtedness by the defendant, and added "that the same was still due and unpaid," the general denial was held a sufficient answer to

¹ *McKyring v. Bull*, 16 N. Y. 297; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 443, per Davies J.; *Texier v. Gouin*, 5 Duer, 889, 891, per Oakley C. J.; *Martin v. Pugh*, 28 Wisc. 184; *Phillips v. Jarvis*, 19 Wisc. 204; *Stevens v. Thompson*, 5 Kans. 305, distinguishing *Marley v. Smith*, 4 Kans. 183, on the ground that in the latter case the allegations were unusual; *Baker v. Kistler*, 18 Ind. 63; *Hubler v. Pullen*, 9 Ind. 278; *Bassett v. Lederer*, 1 Hunn, 274, an action for goods sold and delivered. The complaint stated that defendant "had not paid the price, nor any part thereof:" the answer was a general denial. Held, that proof of payment

under the issue was error. This case certainly goes further than any other, and is inconsistent with those cited in the next following note. *Hall v. Olney*, 65 Barb. 27, an instance of payment after suit brought. Held, that defendant should have set up the defence in a supplemental answer.

² *Quin v. Lloyd*, 41 N. Y. 349, 352, per Lott J.: "The denial involved an issue upon all the facts above stated and denied, not only of the agreement and of the time which the plaintiff worked, but necessarily of the different payments made, so as to determine what in fact was the balance of the defendant's debt. That balance could

allow proof of payment.¹ In an action for work and labor, the complaint alleged the services to a specified amount in value, and that there was a balance due the plaintiff, "after deducting all payments made by defendant to plaintiff thereon, of \$175." The general denial, it was held, entitled the defendant to prove all the payments which he had made.² This special rule has been repeatedly acted upon by the courts of California. Indeed, as has been before stated, they have gone much farther, and have made it a general requisite, in actions upon promissory notes at least, that the complaint must aver the non-payment as a breach in a distinct form, or it will fail to state a cause of action; and that the general denial of such a pleading necessarily admits evidence of payment. In some of the cases the judges have gone to the length of declaring that the general denial, like the general issue of *nil debet* or *non assumpsit*, always admits the defence of payment.³

§ 701. When a defence of payment is pleaded, it is competent to show that the payment was actually made in cash, or in some other manner agreed upon by the parties: as that it was made by the delivery of chattels, which were received by the creditor in satisfaction of his demand;⁴ or by the giving and acceptance of any thing that is received in the place of money, and in discharge of the debt.⁵ But under the answer of payment in an action upon a note, the defendant cannot prove a want of consideration for the note, or a mistake in its execution, or an error in the prior accounting and the ascertaining the balance for which it was given, or the execution of a contemporaneous writing which modifies or controls the legal effect of the note; and the same doctrine is plainly applicable to actions upon any species of written agreement.⁶

not be ascertained without an inquiry as to the amount of the payments, as well as the value of the work performed." Also per Woodruff J. (p. 354): "It was wholly unnecessary for the plaintiff to sue for a balance as such. He might allege the contract, performance on his part, and claim payment; and then, if the defendant desired to prove payment, he must allege payment in his answer. But where the plaintiff sues for a balance, he voluntarily invites examination into the amount of the indebtedness, and the extent of the reduction thereof by payment."

¹ Marley v. Smith, 4 Kans. 183, 186. Explained in Stevens v. Thompson, 5 Kans. 805.

² White v. Smith, 46 N. Y. 418.

³ Frisch v. Caler, 21 Cal. 71; Fairchild v. Amsbaugh, 22 Cal. 572; Wetmore v. San Francisco, 44 Cal. 294, 299, per Crockett J.; Davanay v. Eggenhoff, 48 Cal. 395, 397, per Rhodes J.

⁴ Farmers' Bank v. Sherman, 33 N. Y. 69.

⁵ Hart v. Crawford, 41 Ind. 197.

⁶ Lowry v. Shane, 34 Ind. 495.

§ 702. The defence of an arbitrament and award covering the same matters in controversy as those stated in the complaint is new matter, and must be pleaded;¹ and so also is the defence of a former recovery for the same cause of action,² and of a former partial recovery.³

§ 703. *Actions to recover Possession of Chattels.* In an action to recover possession of chattels, the complaint alleging property in the plaintiff, and the answer specifically denying the wrongful taking and detention of the goods, and no more, the facts relied upon by the defendant as constituting his actual defence were, that the plaintiff and one G. were partners and the real owners of the goods in question, and that G. had bailed them to the defendant, who retained them in virtue of such bailment. This defence, however, was held inadmissible under the pleadings, because, first, the unqualified ownership of the plaintiff was admitted on the record by the failure of the answer to deny the allegation of property contained in the complaint; and, secondly, the authority conferred by one owner, G., upon the defendant, to take and retain possession of the chattels, was new matter, and should have been pleaded.⁴ And, in a similar action, a defence that the defendant had loaned money to the plaintiff's intestate, who was the late owner of the chattels, and had received from him the possession thereof, and retained them in possession as security for such advances, is new matter, and cannot be proved unless specially pleaded;⁵ and the same is true of the defence, that the plaintiff's title is fraudulent and void as against his creditors.⁶

§ 704. *Actions for Torts.* In an action to recover damages for the conversion of chattels, a justification by the defendant as sheriff, under an attachment, judgment, execution, and levy against a third person, charging that the goods were the property

¹ *Brazill v. Isham*, 12 N. Y. 9, 17, per Gardiner J.: "The defendants cannot avail themselves of the award in this case as a defence, as they have not insisted upon it in their answer. The plaintiff had stated in his complaint a *prima facie* cause of action arising on the original retainer of the defendants. To meet the case thus made by new matter constituting a defence, it must be set forth plainly in the answer. An award or former recovery for the same cause would fall within this

category; for the defences admit the contract as stated, and avoid its effect by matter *ex post facto*."

² *Hendricks v. Decker*, 85 Barb. 298; *Piercy v. Sabin*, 10 Cal. 22; *Norris v. Amos*, 15 Ind. 365.

³ *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 443.

⁴ *Tell v. Beyer*, 38 N. Y. 161.

⁵ *Gray v. Fretwell*, 9 Wisc. 186.

⁶ *Frisbee v. Langworthy*, 11 Wisc. 875.

of such judgment debtor, and had been fraudulently assigned and transferred by him to the plaintiff, so that the latter's title was void, cannot be proved under an answer of denials, but must be pleaded as new matter.¹ There are cases which go to the extent of holding, that, under the general denial, — which traverses the indispensable averment of a sufficient property in the plaintiff, — the defendant cannot show property in himself:² but this ruling seems opposed to the weight of authority; and it is certainly contrary to the plainest principles of pleading, for such facts, when proved, merely contradict the plaintiff's averment of his own title.³

§ 705. In the action for breaking and entering the plaintiff's premises (*trespass qu. cl. fr.*), with the complaint in the proper form, and without any unnecessary averments, the general denial does not raise any issue as to the title to the land, and no evidence attacking such title can be received except under a separate defence;⁴ nor can any defence of justification be proved unless specially pleaded.⁵ Where two or more unite as plaintiffs in an action for the taking and carrying away their goods, a defence that "the plaintiffs are not joint owners of the goods and chattels mentioned in the complaint" is new matter.⁶ To a complaint for an assault and battery committed by a railroad conductor in forcibly ejecting the plaintiff from the cars, the general denial was pleaded: under this issue, the defendant was not permitted to show the regulations of the company, that they were reasonable, and that he was complying with them in doing the act complained of.⁷ The defence of recaption, or its equivalent, in an action against a sheriff for an escape, is new matter. An

¹ *Jacobs v. Remsen*, 12 Abb. Pr. 390; *Graham v. Harrower*, 18 How. Pr. 144.

In the latter case, T. R. Strong J. seems to concede, that, under a denial of the allegation of property in the plaintiff, the defendant may prove general property in himself, but not a justification under judicial process. *Frisbee v. Langworthy*, 11 Wisc. 375, an action to recover possession, but governed by the same rule as to pleading a justification. *Isley v. Huber*, 45 Ind. 421; *Boaz v. Tate*, 48 Ind. 60, 71, 72; *Johnson v. Cuddington*, 35 Ind. 43; *Langton v. Hagerty*, 35 Wisc. 150, 161.

² *Dyson v. Ream*, 9 Iowa, 51.

³ See *supra*, §§ 677, 678.

⁴ *Squires v. Seward*, 16 How. Pr. 478; *Rathbone v. McConnell*, 20 Barb. 311; *Althouse v. Rice*, 4 E. D. Smith, 347.

⁵ *Johnson v. Cuddington*, 35 Ind. 43.

⁶ *Walrod v. Bennett*, 6 Barb. 144.

⁷ *Pier v. Finch*, 29 Barb. 170. In an action for false arrest and imprisonment, proof of the plaintiff's bad character in respect to the offence for which he was arrested cannot be proved under the general denial, *Scheer v. Keown*, 34 Wisc. 349.

answer setting up this defence having been pleaded, the defendant, at the trial, offered to prove, not the return or the retaking of the prisoner, but that he would have voluntarily returned, and was intending to do so, had he not been prevented from accomplishing his purpose by the fraud of the plaintiff. This defence was held inadmissible under a general denial, or under the special answer of recaption, because it was new matter, and the allegations and proofs must agree.¹ The defence of recoupment of damages is in all cases new matter, and must therefore be pleaded, although it is often a partial defence analogous to those in mitigation.²

§ 706. *Actions concerning Lands.* In the legal action to recover possession of land, the complaint or petition being in the common form, alleging in general terms that the plaintiff is seized in fee of the premises, and the wrongful taking and withholding possession thereof by the defendant, and the answer consisting merely of denials general or specific, the defendant cannot, it has been held, prove a prior *equitable* title in himself derived from the plaintiff or his grantor, although a *legal* title in himself may be proved, as this would directly contradict the averment in the complaint that the plaintiff was owner of the premises.³ An action was brought by a wife against her husband to establish her title to certain lands. The complaint alleged facts showing that she was the equitable owner of the lands, which had been purchased by the husband with her money under an understanding that the conveyance was to be made directly to her, but which he had, in

¹ Richtmeyer v. Remsen, 38 N. Y. 206, 208, per Grover J.: "The question is, whether these grounds of defence must be set up in the answer; that is, whether the defence offered consists of new matter, or whether it merely disproves any of the material allegations of the complaint. All that the plaintiff must allege and prove to maintain his action is the recovery of the judgment, the issue and delivery of execution to the sheriff, the capture of the debtor on the execution, and the escape from custody before suit brought against the sheriff therefor. We have seen that the sheriff may defend the action by proving a recaption of the debtor before suit brought, or facts legally excusing him from making such recap-

tion. Proof of such facts do not controvert any allegations of the complaint. It is, therefore, new matter, constituting a defence to the action, and, under the code, is inadmissible unless set up in the answer."

² Crane v. Hardman, 4 E. D. Smith, 448.

³ Stewart v. Hoag, 12 Ohio St. 623; Lombard v. Cowham, 34 Wisc. 486, 491; Hartley v. Brown, 46 Cal. 201. See *supra*, § 679, as to what defences may be proved under the general denial in this action. A title accruing to the defendant since the commencement of the action must be pleaded by a supplemental answer. Roper v. McFadden, 48 Cal. 346, 348; McLane v. Bovee, 35 Wisc. 27, 34.

fraud of her rights, procured to be made to himself: it prayed that she might be declared the owner, and that a deed to her from her husband might be ordered. W., a judgment creditor of the husband, was permitted to intervene, and was made a party defendant. He simply pleaded a general denial. This answer, it was held, put in issue only the averments of the complaint, and did not permit the defendant W. to set up and prove his character or rights as a judgment creditor of the husband. In short, he could obtain no advantage from his intervention, because no allusion was made in the complaint to his position and claims as a creditor: that subject-matter was entirely outside of its averments.¹ A widow sued to recover her dower in lands which the husband had conveyed to the defendant during the marriage without any release from herself, and stated in her complaint the facts necessary to make out the cause of action. The answer set up as a defence that the husband left a last will, in which he devised and bequeathed to the plaintiff certain property to be received by her in lieu of dower; that she had elected to take the gift under the will, and had thus barred her right of dower. This defence was held to be new matter, and to have been admitted by the plaintiff's neglect to reply and controvert its statements.² In an action brought by the owners of lots abutting upon a certain alley in a city to restrain the corporation from improving such alley, on the ground that it was a private passage belonging to the plaintiffs, the complaint contained the averments of property in the plaintiffs necessary to show a right of action. The answer stated facts showing that the original owner of the land — the grantor or source of title of the plaintiffs — had dedicated this alley to public use, and that it had thus been made a highway. These facts, it was held, could not be proved under a general denial: they were new matter, and must be specially pleaded.³ The defence of long-continued adverse user or pre-

¹ *Watkins v. Jones*, 28 Ind. 12.

² *McCarty v. Roberts*, 8 Ind. 150. A reply to all new matter was necessary. In a creditor's suit to reach a debt due to the judgment debtor as the vendor of land from the vendee thereof, both being defendants, the latter's answer, that the purchase-price had been fully paid to the vendor, was held to be new matter, and to require a reply, in *Ohio, Edwards v. Edwards*, 24 Ohio St. 402, 411.

³ *City of Evansville v. Evans*, 37 Ind. 229, 236. This decision seems to be opposed to the well-settled doctrines concerning the office and effect of the general denial. The complaint alleged a property in the plaintiffs, which was the very gist of their action; and a general denial would permit the defendant to contradict such allegation. Proving a dedication to the public is nothing more nor less than showing title in the defendant, the city;

scription in actions affecting the title or possession of lands, or involving the existence of easements, is, in general, new matter; for, in the usual form of such actions, the defence will be in the nature of a justification of the acts complained of. Thus, for example, in an action brought to remove a dam maintained by the defendant, and to restrain his diversion of water from the stream, and for damages, the defence of a long adverse user or prescription, by which his right to the dam and to the water had become perfect, is new matter, and should be pleaded.¹

§ 707. *Actions upon Contract.* The defence of usury is clearly new matter;² and the facts showing the usurious agreement and the entire transaction must be stated with fulness and circumstantiality.³ The general denial in an action to recover damages for the breach of a promise to marry does not admit the defence of the improper habits and bad character of the plaintiff; as, that she habitually used intoxicating liquors to excess, and was in the habit of becoming intoxicated. Such facts, if they amount to a defence in bar, are new matter, and must be alleged in the answer.⁴ The owner of a building incumbered by a mortgage procured it to be insured against fire, the policy being made payable to the mortgagee. In an action on this policy brought by the payee therein, the defence that the mortgage had been foreclosed, the land sold, and the mortgage debt partly discharged out of the proceeds, was held inadmissible under an answer of mere denials. These facts constituted a partial defence in the nature of payment, and were clearly new matter.⁵ In a suit against a surety, the defence of his discharge from liability by reason of an extension of the time of payment granted to the principal debtor, in pursuance of a private agreement made with the creditor, is new matter, and cannot be proved unless pleaded as such;⁶ and also his discharge by reason of any other subsequent agreement between the principals to the contract.⁷

and this directly controverts the material statements of the complaint.

¹ *Mathews v. Ferrea*, 45 Cal. 51.

² *Catlin v. Gunter*, 1 Duer, 258, 265; *Fay v. Grimstead*, 10 Barb. 821.

³ *Manning v. Tyler*, 21 N. Y. 567, 568.

⁴ *Button v. McCauley*, 38 Barb. 413. Compare *Tompkins v. Wadley*, 8 N. Y. S. C. 424, 430, which holds that in such an action an act of unchastity committed

by the plaintiff can be proved in mitigation under the general denial.

⁵ *Grosvenor v. Atlantic Fire Ins. Co.*, 1 Bosw. 469.

⁶ *Newell v. Salmons*, 22 Barb. 647.

⁷ *Horton v. Ruhling*, 3 Nev. 498. In an action upon an account stated, the defence of mistake or error in any of its items is new matter, and cannot be proved under a general denial, *Warner v. Myrick*, 16 Minn. 91; and the defence that a writ-

§ 708. The rule is well settled in strict accordance with the true theory of pleading under the codes, that all defences based upon the asserted illegality of the contract in suit, which admit the fact of a transaction between the parties purporting to be an agreement, and apparently binding, but which insist that by reason of some violation of the law the same is illegal and void, are new matter, and must be set up in the answer in order to be provable. A few examples will illustrate this rule.¹ In an action against a city upon a contract made with the plaintiff by the street commissioners, the answer alleged that these officers did not proceed according to the statute defining their powers, that they did not publish the proper notice of the letting the contract prescribed by the city charter, and that the contract itself was therefore invalid. To this answer there was no reply; and as the code of Minnesota required a reply to all new matter, the defendant claimed that these averments were by reason of the omission admitted to be true. The court so held, pronouncing the defence new matter which could not be proved under a general denial.² The defence that the contract in suit was entered into on Sunday, and is for that reason illegal and void under the statute, is new matter;³ and that the demand was for liquors sold by an innkeeper on credit contrary to statute;⁴ and that the plaintiff carried on business by himself under a firm name, there being no partnership, in violation of a statute;⁵ and that the contract was in restraint of trade.⁶

§ 709. In actions upon instruments which *prima facie* import a consideration, — that is, upon notes, bills, and other negotiable paper, and writings under seal, — the defence of a want of consideration is new matter;⁷ but where there is no such presumption in favor of the contract, the same defence may be proved under

ten instrument sued on has been altered, *Boomer v. Koon*, 6 N. Y. S. C. 645; and the facts which authorize the application of the "scaling laws" in North Carolina to contracts of indebtedness, *Bank of Charlotte v. Britton*, 66 N. C. 365.

¹ The defence of fraud is new matter, and must be pleaded in all actions, whether brought upon contract or to enforce alleged rights of property in the plaintiff, *Jenkins v. Long*, 19 Ind. 28; *Farmer v. Calvert*, 44 Ind. 209, 212; *Daly v. Proetz*, 20 Minn. 411, 417.

² *Nash v. St. Paul*, 11 Minn. 174, 178; and see *Finley v. Quirk*, 9 Minn. 194, 200, 203.

³ *Finley v. Quirk*, 9 Minn. 194, 200, 203.

⁴ *Denton v. Logan*, 8 Metc. (Ky.) 434.

⁵ *O'Toole v. Garrin*, 8 N. Y. S. C. 118.

⁶ *Prost v. More*, 40 Cal. 347.

⁷ *Frybarger v. Cokefair*, 17 Ind. 404; *Bingham v. Kimball*, 17 Ind. 396; *Dubois v. Hermance*, 56 N. Y. 673, 674; *Beeson v. Howard*, 44 Ind. 413, 415.

the general denial.¹ Where suit is brought for goods sold and delivered, or bargained and sold, the defence of a warranty on the sale, and a breach thereof, is clearly new matter.² If an action is brought for the possession or for the value of securities claimed to belong to the plaintiff, and alleged to have been in some manner wrongfully transferred to and detained by the defendant, the defence that the latter purchased the same in good faith, and is a *bona fide* holder thereof, is, in general, new matter.³ It is plain, however, that the character of this defence will largely depend upon the form of the complaint. The latter might naturally contain averments denying the good faith of the defendant's possession, or stating a want of consideration in the transfer to him, so that a mere denial would raise an issue, and admit evidence of the defence. A judgment having been confessed in which the statement of indebtedness was so informal and incomplete that the whole was *prima facie* void as against other creditors, an action was brought to set aside the judgment so confessed. The answer in this action set out in full all the facts of the original indebtedness which tended to show that an actual debt existed, and that the confession was in good faith and valid. This answer the Supreme Court of California held to be new matter: it was in avoidance, and not in denial of the case made by the complaint.⁴

§ 710. The distinction between new matter and denials was clearly stated in a recent decision by the Supreme Court of Missouri. In an action upon an attachment bond, the petition set out the bond, and alleged as a breach that the plaintiff in the attachment suit had failed to prosecute the same, and that the attachment had been abated by a judgment of the court in that proceeding. The answer admitted the bond, denied the breach, and asserted that the original suit was still pending by a motion in arrest of judgment and for a new trial. No reply having been pleaded, these averments of the answer were held at the trial to have been admitted. This ruling was reversed on error, and the answer was held to be merely a denial.⁵

¹ See cases cited, *supra*, § 876. In the latter class of actions, a consideration must be averred in the complaint.

² *Fetherly v. Burke*, 54 N. Y. 646.

³ *Weaver v. Barden*, 49 N. Y. 286, 297, per Grover J.

⁴ *Pond v. Davenport*, 45 Cal. 225. The correctness of this decision may be doubt-

ed. The answer is rather an argumentative denial. The complaint in effect charged fraud; and, if a general denial had been pleaded, the same facts would have been evidence in its support to disprove the fraud.

⁵ *State v. Williams*, 48 Mo. 210, 212: "The general rule is, that any fact

§ 711. *Defences in Abatement, and particularly those relating to the Joinder and Capacity of the Parties.* The nonjoinder of necessary parties cannot be proved under the general denial; it is new matter, and must be pleaded:¹ nor can the misjoinder of plaintiffs be relied upon under a denial; the question must be raised by a demurrer or by a special answer.² The defence that the plaintiff is not the real party in interest is new matter. A general averment, however, to that effect, is not enough: the facts must be stated which constitute the defence, and which show that he is not the real party in interest.³ The objection that the plaintiff has not the legal capacity to sue, unless it appears on the face of the complaint or petition so that it can be raised by demurrer, is new matter. Being in the nature of a dilatory defence, like that of a defect of parties, the facts which constitute it must be stated with certainty: a mere general averment would raise no issue.⁴ In application of this rule, the objection that the plaintiff or the defendant is a married woman, when relied on as a defence, cannot be proved under a general denial, but must be pleaded as new matter;⁵ and in an action by an executor or administrator, the general denial does not put in issue the plaintiff's title to sue.⁶ The defence, that the action was commenced before the cause of action had accrued, cannot, it has been held, be proved under a general denial, but must be set up in the answer specially. Thus, in an action for work and labor on an open account, where the answer was a general denial, the defence, that the account was

which avoids the action, and which the plaintiff is not bound to prove in the first instance in support of it, is new matter; but a fact which merely negatives the averments of the petition is not new matter, and need not be replied to. Moreover, an answer setting up new matter by way of defence should confess and avoid the plaintiff's cause of action. *Bauer v. Wagner*, 39 Mo. 385; *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435. The allegation in question is merely in denial of facts which the plaintiff must prove to make out his *prima facie* cause of action."

¹ *Abbe v. Clarke*, 31 Barb. 238.

² *Gillam v. Sigman*, 29 Cal. 637.

³ *Jackson v. Whedon*, 1 E. D. Smith, 141; *Savage v. Corn Exch. F. Ins. Co.*, 4 Bosw. 1; *Raymond v. Pritchard*, 24 Ind. 318; *Garrison v. Clark*, 11 Ind. 389;

Swift v. Ellsworth, 10 Ind. 205; *Lamson v. Falls*, 6 Ind. 309.

⁴ *Cal. Steam. Nav. Co. v. Wright*, 8 Cal. 585; *Wade v. State*, 37 Ind. 180, 182; *Wright v. Wright*, 54 N. Y. 437, 441; 59 Barb. 505; *Burnside v. Matthews*, 54 N. Y. 78, 82, "must be pleaded specially and with certainty to a particular intent;" *Barclay v. Quicksilver Mining Co.*, 6 Lans. 25, 30; *Phoenix Bank v. Donnell*, 40 N. Y. 410.

⁵ *Dillaye v. Parks*, 31 Barb. 132; *Johnson v. Miller*, 47 Ind. 376, 377; *Landers v. Douglas*, 46 Ind. 522; *McDaniel v. Carver*, 40 Ind. 250; *Elson v. O'Dowd*, 40 Ind. 300; *Van Metre v. Wolf*, 27 Iowa, 341; *Wagner v. Ewing*, 44 Ind. 441; *Kennard v. Sax*, 3 Oreg. 268, 265.

⁶ *White v. Moses*, 11 Cal. 69.

not due at the time the action was commenced according to the terms of a special contract, was excluded on the ground that it should have been pleaded.¹ The defence, that another action is pending for the same cause, must be specially pleaded, unless it is raised by demurrer.²

§ 712. *Miscellaneous Defences.* The defence of license is new matter, and cannot be proved unless pleaded.³ According to the decided weight of authority, an estoppel *in pais* cannot be proved under a general denial, but is new matter.⁴ An accord and satisfaction is also new matter;⁵ and a discharge in bankruptcy or insolvency;⁶ and a defence based upon a statutory provision prohibiting banks from paying out notes not received by them at par;⁷ and a defence founded upon the plaintiff's failure to perform a contract collateral to the demand set up in the complaint, and upon which the liability of the defendant depended.⁸

§ 713. *Statute of Limitations.* Different rules prevail in the different States in respect to pleading the Statute of Limitations. In some, by reason of an express provision of their codes, the defence must always be specially set up in the answer, and can never be raised by demurrer, even though the averments of the complaint should show that the cause of action is barred. In others it may always be taken advantage of by demurrer whenever the complaint or petition discloses a cause of action which appears to be barred by the statute. The courts of still other States occupy a middle ground between these extremes. If the provisions of the statute relied on are not absolute, but contain exceptions or provisos within which the case could possibly fall, and which might, therefore, prevent the bar of the statute from applying to the cause of action, the demurrer is never proper, because, although not so alleged, the case *might* come within the

¹ Hagan v. Burch, 8 Iowa, 309; Smith v. Holmes, 19 N. Y. 271.

² Walsworth v. Johnson, 41 Cal. 61.

³ Beaty v. Swarthout, 32 Barb. 293, 294; Haight v. Badgeley, 15 Barb. 499; Snowden v. Wilas, 19 Ind. 10; Gilbert v. Sage, 5 Lans. 287; Alford v. Barnum, 45 Cal. 482, 485; Chase v. Long, 44 Ind. 427, 428.

⁴ Wood v. Ostram, 29 Ind. 177, 186; Davis v. Davis, 26 Cal. 23; Etcheborne v. Auzeais, 45 Cal. 121; Clark v. Huber, 25 Cal. 593, 597; but see Caldwell v.

Auger, 4 Minn. 217. An estoppel by judgment must be pleaded if there is or has been any opportunity to do so. Clink v. Thurston, 47 Cal. 21, 29; *per contra*, Larum v. Wilmer, 35 Iowa, 244, 247.

⁵ Coles v. Soulsby, 21 Cal. 47, 50.

⁶ Cornell v. Dakin, 38 N. Y. 253, 256.

⁷ Codd v. Rathbone, 19 N. Y. 37.

⁸ Blethen v. Blake, 44 Cal. 117; and the defence of irregularity on the part of the arbitrators in an action upon an award, Day v. Hammond, 67 N. Y. 479, 484.

exception or proviso: the answer is then the only mode of presenting the defence. But if the particular provisions of the statute *are* absolute, and contain no such exceptions or provisos within which the case could possibly fall, a demurrer may be interposed when the objection appears upon the face of the plaintiff's pleading; but if it does not so appear, the defence must be set up by answer.

§ 714. In New York the rule is settled, and applied to all actions whether legal or equitable, that the effect of the Statute of Limitations as a defence can only be made available by an answer; that a demurrer can under no circumstances raise the issue; and finally, that the defence is new matter.¹ In Indiana, if the provision of the statute invoked contains no exceptions or provisos, and it appears on the face of the complaint that the cause of action is barred, the defendant can demur; but when there are exceptions or provisos in the operative clause of the statute relied upon, the defence can only be set up by a special answer, and cannot be made available under a general denial.² Even in those States where the statute may be taken advantage of by demurrer, as well as in all the others, it is, when set up by answer, new matter, and can never be proved under a denial, either general or special.³ When the Statute of Limitations of another

¹ *Sands v. St. John*, 36 Barb. 628; *Baldwin v. Martin*, 14 Abb. Pr. n. s. 9.

² *Perkins v. Rogers*, 35 Ind. 124, 141, and cases cited; *Hanna v. Jeffersonville*, &c. R. R., 32 Ind. 113; but see *Matlock v. Todd*, 25 Ind. 128, which seems to hold that a demurrer is never proper in legal actions, but may be used in equitable actions, according to the former practice in equity.

³ *McKinney v. McKinney*, 8 Ohio St. 423; *Backus v. Clark*, 1 Kans. 308; *Howell v. Howell*, 15 Wisc. 55, 59. This last case holds that the defendant may demur, although the Wisconsin code enacts that "the objection that the action was not commenced within the time limited can only be taken by answer;" R. S. ch. 138, § 1. The court said that "answer" must be taken in its widest sense of any defensive pleading including a demurrer. But see the later case of *Tarbox v. Supervisors*, 84 Wisc. 558, which expressly holds that the Statute of Limitations can

only be taken advantage of by answer in the State of Wisconsin. *Hartson v. Hardin*, 40 Cal. 284. The rule is settled in many States, that when it affirmatively appears on the face of the complaint or petition that the cause of action is barred by the statute, and only then, the defendant may demur; otherwise he must plead the defence specially, since it is never admissible under the general denial, except in the action to recover possession of land in certain States by virtue of express provisions of their codes. It is so held in Ohio, *Huston v. Craighead*, 28 Ohio St. 198, 209, 210; in Minnesota, *Davenport v. Short*, 17 Minn. 24, the court saying that they would not extend the rule laid down in *Kennedy v. Williams*, 11 Minn. 814; *McArdle v. McArdle*, 12 Minn. 98; *Eastman v. St. Anthony's Falls W. P. Co.*, 12 Minn. 187; *Hoyt v. McNeil*, 18 Minn. 390; in Kansas, *Parker v. Berry*, 12 Kans. 351; in California, *Brennan v. Ford*, 46 Cal. 7, 12; in Iowa, *Robinson v. Allen*,

State or county is relied upon as a defence, the answer must contain all the averments of fact necessary to bring the case within the provisions of such foreign enactment: nothing will be presumed in favor of the pleader.¹

SECTION FIFTH.

THE UNION OF DEFENCES IN THE SAME ANSWER.

§ 715. All the codes, with some slight difference in the language, but with none in the meaning and effect of the clause, provide that the defendant may set up in his answer as many defences and counterclaims and set-offs as he may have, whether they be such as have heretofore been denominated legal or equitable, or both. When defences are thus united, they must each be separately stated, and refer to the causes of action they are intended to answer. I shall, in the present section, collect the practical rules which have been adopted by the courts in construing this provision, touching the mode of pleading different defences in one answer.

I. How the Separate Defences should be stated.

§ 716. The distinction between partial and full defences has already been pointed out. Assuming that the defences are not intended to be partial, each must of itself be a complete answer to the whole cause of action against which it is directed, as perfectly so as though it were pleaded alone. It is not necessary that each defence should answer the entire complaint when that contains two or more distinct causes of action, because these causes of action may depend upon separate circumstances, and demand separate answers. If a defence, however, is addressed to the whole complaint, as such, it must completely controvert the whole. The rule, as stated in its general form, is, that each defence must be sufficient in itself, in its material allegations or its denials, to constitute an answer to the cause or causes of

37 Iowa, 27, 29; *Shearer v. Mills*, 35 Iowa, 499; *Moulton v. Walsh*, 30 Iowa, 361; *Springer v. Clay Co.*, 35 Iowa, 241; in Nebraska, *Mills v. Rice*, 3 Neb. 76, 87; in Missouri the defence can be proved under a general denial, when the action is for the recovery of land, *Bledsoe v. Simma*, 53 Mo. 805, 307.
¹ *Gillett v. Hill*, 32 Iowa, 220.

action against which it is directed, and thus to defeat a recovery thereon. This proposition refers to the substance of the defence. In reference to the form and manner of stating this substance, it must, either by actual statement in full, or by a proper reference to and adoption of matter in another defence found in the same answer, contain averments of all the material facts or denials which together make up the defence. Each must in its composition be complete, sufficient, and full; it must stand upon its own allegations: it cannot be aided, nor its imperfect and partial statements helped out, by matter found in another defence, unless such matter is expressly referred to, and in an express manner adopted or borrowed from that other, and made a part of itself. The reference, however, to the former defence, and the adoption of its matter, if permitted at all, must be express; for otherwise the allegations of one cannot be treated as incorporated in or helping out those of another. This rule is well settled by the authorities, although often disregarded in practice.¹ If the defence is professedly a partial one, the foregoing rule applies only so far as respects the manner and form of stating the facts. In a partial as well as in a full defence, the averments cannot be aided by matter found in another defence, unless the same is expressly referred to and adopted. It should be observed also, that in the case of answers containing several defences, as well as of complaints containing several causes of action, certain allegations may be introductory, not forming a portion of either defence in particular, but belonging alike to all, so that they should be once made at the commencement of the answer before any one of the separate defences is stated.

§ 717. In this connection I shall offer a few suggestions in

¹ *Baldwin v. U. S. Tel. Co.*, 54 Barb. 505, 517: "By the well-settled rules of pleading, each answer [defence] must of itself be a complete answer to the whole complaint, as perfectly so as if it stood alone. Unless it, in terms, adopts or refers to the matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains." *Nat. Bank of Michigan v. Green*, 38 Iowa, 140, 144: "When the answer contains separate defences, each defence must be sufficient in itself: it cannot be aided by matter in another defence. If not thus complete and sufficient, it is de-

murrable." Defences should be separately stated and numbered: but a failure to comply with this rule can only be taken advantage of by a motion to correct; if such motion is not made, the objection is waived, *Truitt v. Baird*, 12 Kans. 420, 423. Each defence must be complete in itself, and cannot be aided by reference to the allegations in another, *Potter v. Earnest*, 45 Ind. 416; *Mason v. Weston*, 29 Ind. 561; *Day v. Vallette*, 25 Ind. 42; *Leabo v. Detrick*, 18 Ind. 414; *National Bank v. Green*, 38 Iowa, 140; *Knarr v. Conaway*, 42 Ind. 260, 264.

reference to the proper mode of pleading specific denials ; a mode which is perhaps not in terms prescribed by the codes, but which is, I think, plainly included within the spirit of the statutory requirements, and which, if universally adopted, would do much to perfect the practical workings of the theory which lies at the foundation of the reformed procedure. The advocates of the common-law pleading have never ceased to urge that it served to bring out and present to the jury for their decision a *single issue*, — the affirmation and negation of a single fact, the verdict upon which determined the entire controversy. This *theory* is certainly very beautiful. We know, however, that in practice the results were far different. Instead of this single issue, in the actions of *assumpsit*, of debt on simple contract, and of *trover*, the general issue had come to be almost the only answer used, and under it nearly every possible defence was admissible. This evil produced the reform of 1834 in England. That reform consisted in limiting the effect of the general issue in respect of the defences which could be admitted under it. All matters in confession and avoidance were required to be specially pleaded ; and many of the matters stated in the declaration, which went to make up the cause of action, were required to be specifically denied by a separate traverse to each. To illustrate : In the action of *assumpsit*, if the contract sued on was express, the general issue of *non-assumpsit* only denied the making of the contract, the promise ; if it was implied, the same general issue only denied the existence of the facts from which the promise would by law be inferred. If the defendant desired to deny the alleged breach, he was obliged to do so by a separate specific denial, or “special traverse” as it was called. In this manner the issues were made and kept single ; at least, if there were several issues formed by the various traverses and pleas comprised in the same answer, each was single, — the affirmation and negation of one material, issuable fact. Each “special traverse” was a distinct plea by itself, and denied some averment in the declaration which was necessary to the maintenance of the action, so that, if the defendant was successful on any one traverse, he defeated the entire recovery in respect to that cause of action. This great reform undoubtedly restored the common-law system of pleading somewhat to its original theory.

§ 718. While a similar condition of affairs was existing in this

country, the Reformed American Procedure was introduced with its radical changes, its complete departure from the ancient notions. Enemies of the system, both on the bench and at the bar, have constantly reiterated the objection, that it made no provision for the development through the means of pleading, and for the presentation to juries, of single and separate issues of fact. No objection could be more grossly unfounded. The common-law methods, as wrought out by the courts, had certainly and notoriously failed to produce that desired result; and these objectors, when they assailed the code and compared it with the former system, obstinately shut their eyes to what that system *actually did* in its every-day working, and only repeated what the theorists asserted that it *ought to do*. If the spirit and design of the code, as clearly shown through all of its important clauses and sections, were accepted and carried out by the courts and the profession, and if its plain requirements were obeyed to the full extent of their meaning, the very same beneficial results attained in England by the legislation and judicial action of 1834 would be accomplished wherever the new procedure has been established.

§ 719. It seems to me to be the evident purpose of the codes that all issues of fact should be separated and made single; and that, if such a practice has not yet been generally attained, it is because the rules prescribed by the statute have been violated or ignored; in short, the fault cannot be charged to the system itself. The codes expressly prescribe that each defence must be separate and distinct, and must be so pleaded. In respect to defences of new matter, this requirement is as precise and exacting as any rule of the common law.¹ It is the duty of courts to insist upon a compliance with this statutory regulation, if juries are to be at all aided in their labors by the issues as presented upon the records. To combine a defence of accord and satisfaction, for example, with one of payment, is as marked a violation of the new procedure as of the common-law theory. Is there any different principle or rule in reference to defences of denial? I answer, No. No such difference can be pointed out in the stat-

¹ See *Rose v. Hurley*, 39 Ind. 77, 81. In an action upon a note given for the price of an article sold by the plaintiff to the defendant, one defence of the answer contained mingled allegations of a warranty given on the sale which had been broken, and of fraudulent representations in respect to the article made by the seller. This defence was overruled on demurrer. The opinion of Downey J. is valuable and instructive.

ute itself; and this fact alone is sufficient to show the correctness of the answer. But the proof of its correctness is positive. The code permits a general denial which controverts all the material allegations of the complaint or petition, and thus presents a broad issue, but still an issue which is not incumbered with any matter by way of confession and avoidance. The code also permits specific denials; that is, a separate denial of some material allegation of the complaint or petition. *These specific denials are identical in design and effect with the special traverses provided for by the English rules of 1834.* Each specific denial should be an entire defence by itself, and should be so pleaded, because it should be the denial of some single, material, issuable matter averred in the complaint necessary to the existence of the cause of action, so that, if sustained, it would entirely defeat a recovery on that cause of action. As the code requires each defence to be separately stated, it follows that a specific denial should always constitute by itself a distinct and complete defence, and should be pleaded in such form, as much so as any defence of new matter. If the true design and intent of the code in this respect were fully carried out, two or more specific denials could never be combined in one and the same defence. The answer might contain several such denials, but each would be stated as one entire, independent defence, distinct from all the others, and thus presenting one issue of fact, arising from the averment of the complaint or petition and its traverse.

§ 720. If the mode of pleading thus described should be generally adopted, — and it seems to be in strict accordance with both the design and the requirements of the codes, — the immediate result would be the forming of single issues on the record for the consideration of the jury, depending upon one affirmation and one negation, far more perfectly in the actual practice than was accomplished while the ancient procedure remained in existence. The confused method of pleading which has undoubtedly become too common, the failure to distinguish and extract the material issues from the overlying mass of useless details which frequently incumbers the record, is, therefore, no fault of the codes; it is rather in direct opposition to their intent and their express enactments; and it has done far more than all other causes to diminish their usefulness, and to hinder the complete reform which they were designed to consummate. To whatever agency

this partial failure is to be attributed, one thing is certain, — that the courts have ample power to remedy it, and to accomplish all the beneficial objects of the new procedure which were looked for by its authors.

II. *What Kinds of Defences may be joined in one Answer; those in Abatement, and those in Bar.*

§ 721. It is now settled, in direct opposition to the common-law rule, that defences which seek only to abate the particular action in which they are pleaded may be united with those which seek to bar all recovery upon the cause of action. Being joined in the same answer, they are to be tried and determined together at the one trial. The only possible difficulty in the practical operation of this rule arises from the different effects of a judgment in favor of the defendant, rendered upon one or the other of these classes of defences. As such a decision upon the former class does not destroy the plaintiff's right of action, nor prevent him from properly commencing and maintaining another suit for the same cause, while a similar decision upon the latter class does produce that final effect upon the right, and as by a general verdict given for the defendant upon *all* the issues contained in the record, and a judgment entered thereon, it might be difficult, and perhaps impossible, to determine which of these results should follow from the judgment thus pronounced, it is plain, that, at the trial of an action in which the answer unites the two kinds of defence, the judge should carefully distinguish the issues arising from them, and should submit them separately to the jury, and direct a separate and special verdict upon each. By pursuing this course, the record would show exactly the nature of the decision, and of the judgment entered thereon. This mode of procedure has been sanctioned by the highest courts.¹

¹ *Sweet v. Tuttle*, 14 N. Y. 465, 468; *Gardner v. Clark*, 21 N. Y. 899; *Mayhew v. Robinson*, 10 How. Pr. 162; *Bridge v. Payson*, 5 Sandf. 210; *Freeman v. Carpenter*, 17 Wisc. 126; *Thompson v. Greenwood*, 28 Ind. 327; *Bond v. Wagner*, 28 Ind. 462. But see, *per contra*, *Hopwood v. Patterson*, 2 Oreg. 49; *Fordyce v. Hathorn*, 57 Mo. 120; *Cannon v. McManus*, 17 Mo. 345; *Rippstein v. St. Louis, &c. Ins. Co.*, 57 Mo. 86, which retain the common-law rule, and hold that a defence in abatement is waived by pleading matter in bar. In *Gardner v. Clarke*, *supra*, Selden J. said (p. 401): "The only serious inconvenience suggested as likely to result from this construction of the code is, that when an answer embraces both a defence in abatement and one in bar, if the jury find a general verdict, it will be

§ 722. *Inconsistent Defences.* Three different questions are presented under this head: (1) Can inconsistent defences be united in the same answer? (2) When are particular defences inconsistent? (3) If a denial and a defence by way of confession and avoidance are joined, do the admissions of the latter overcome the denials of the former, so that the plaintiff is relieved from the necessity of proving the allegations denied? Although these questions are clearly distinct, yet the two former have often if not generally been confounded in the same decisions, so that it will be difficult to keep them entirely separate in the discussion without much repetition. Assuming that the defences are utterly inconsistent, the rule is established by an overwhelming weight of judicial authority, that, unless expressly prohibited by the statute, they may still be united in one answer. It follows that the defendant cannot be compelled to elect between such defences, nor can evidence in favor of either be excluded at the trial on the ground of the inconsistency.¹ Notwithstanding this array of authorities, a different rule prevails in a few States. The Supreme Court of Minnesota warmly insists that the most important design of the code was to compel the parties to tell the truth in their pleadings; that the decisions have generally violated this principle; and therefore emphatically declares that inconsistent defences cannot be permitted. Inconsistent defences are also forbidden in Missouri, and perhaps in one or two other States.²

impossible to determine whether the judgment rendered upon the verdict should operate as a bar to another suit for the same cause of action or not. It would, however, be the duty of the judge at the circuit, in such a case, to distinguish between the several defences in submitting the cause to the jury, and to require them to find separately upon these. In that way, it is probable that the confusion which might otherwise result, may, in most cases, be avoided. At all events, the code admits, I think, no other construction."

¹ Springer v. Dwyer, 50 N. Y. 19; Buhne v. Corbett, 48 Cal. 264, which holds directly that a defendant may plead as many defences as he pleases. Each must be consistent with itself, but need not be consistent with the others; and

there is no distinction in this respect between verified and unverified answers; Bell v. Brown, 22 Cal. 671; Willson v. Cleaveland, 30 Cal. 192; Mott v. Burnett, 2 E. D. Smith, 50, 52; Hollenbeck v. Clow, 9 How. Pr. 289; Butler v. Wentworth, 9 How. Pr. 282; 17 Barb. 649; Smith v. Wells, 20 How. Pr. 158, 167; Vail v. Jones, 81 Ind. 467; Crawford v. Adams, Stanton's Code (Ky.), 91; Weston v. Lumley, 33 Ind. 486, 488.

² Derby v. Gallup, 5 Minn. 119, 120, an action for taking and carrying away goods. The answer contained two defences: 1. A general denial. 2. Admitted the taking, and justified it under process. The opinion of Atwater J. is very able, and difficult to be answered on principle. See also Cook v. Finch, 19 Minn. 407, 411; Conway v. Wharton, 18 Minn. 158, 160;

§ 723. In many instances the courts have simply declared that the particular defences united in the answers before them were not in fact inconsistent, and have not passed upon the question in its general form. In many of these cases, however, the defences were apparently as inconsistent as those which have been rejected by other courts in the decisions last quoted. I have placed in the foot-note a number of examples, and have indicated the nature of the defences thus suffered to be united.¹

§ 724. When a denial is pleaded in connection with a defence of new matter, or two defences of new matter are set up, the admissions in the one can never be used to destroy the effect of the other. The concessions of a defence by way of confession and avoidance do not obviate the necessity of proving the averments contradicted by the denial. This rule is universal. Even in those States where inconsistent defences are not permitted to stand, the remedy is by striking out, or by compelling an election, and not by using the admissions of one to destroy the issues raised by the other.²

§ 725. When the facts stated in an answer constitute both a

Adams v. Trigg, 37 Mo. 141: "A party cannot interpose a denial, and then avail himself of a confession and avoidance;" *Atteberry v. Powell*, 29 Mo. 429, a general denial and justification in slander held inconsistent; *Fugate v. Pierce*, 49 Mo. 441, 449; but compare *Nelson v. Brodhack*, 44 Mo. 596, which holds that denials and defences of confession and avoidance are not necessarily inconsistent; *Auld v. Butcher*, 2 Kans. 185; and see *Baird v. Morford*, 29 Iowa, 581, 584, 585. The following New York cases, mostly at Special Term, which hold that inconsistent defences cannot be permitted, have been expressly overruled by the more recent ones in the same State cited above in the preceding note. *Roe v. Rogers*, 8 How. Pr. 356; *Schneider v. Schultz*, 4 Sandf. 664; *Arnold v. Dimon*, 4 Sandf. 680.

¹ *Nelson v. Brodhack*, 44 Mo. 596, action of ejectment, general denial, and Statute of Limitations; holds that general denial and confession and avoidance are not necessarily inconsistent, and overrules *Bauer v. Wagner*, 39 Mo. 885; and see *McAdow v. Ross*, 53 Mo. 199, 202; *Kelly v. Bernheimer*, 3 N. Y. Sup. Ct. 140, the

court will not compel an election between defences "unless they are so far inconsistent that both cannot properly coexist in the same transaction;" *Kellogg v. Baker*, 15 Abb. Pr. 286, a general denial, Statute of Limitations, and release, are not inconsistent; *Lansing v. Parker*, 9 How. Pr. 288, in assault and battery, a general denial, self-defence, and defence of possession of land, are not inconsistent; *Ostrom v. Bixby*, 9 How. Pr. 57, denial, and Statute of Limitations; *Ormsby v. Douglas*, 5 Duer, 665, slander, denial, and justification; *Hackley v. Ogmun*, 10 How. Pr. 44, action to recover possession of chattels, general denial, and a justification of the taking; *Booth v. Sherwood*, 12 Minn. 426, trespass to lands; answer, (1) denies title, and (2) license; *Pike v. King*, 16 Iowa, 49, general denial and set-off; *Willson v. Cleaveland*, 30 Cal. 192, ejectment, denial of title, and Statute of Limitations.

² *Quigley v. Merritt*, 11 Iowa, 147; *Shannon v. Pearson*, 10 Iowa, 588; *Grash v. Sater*, 6 Iowa, 301; *Siter v. Jewett*, 33 Cal. 92; *Nudd v. Thompson*, 34 Cal. 39, 47; *Buhne v. Corbett*, 43 Cal. 264. See *Town of Venice v. Breed*, 65 Barb. 597, 603, per *Mullin J.*

defence and a counterclaim, and are not twice pleaded in separate divisions, but are alleged only once with a proper demand for relief as in a counterclaim, the defect, if any, can only be reached by motion. If not so remedied, the defendant may at the trial rely upon the answer in both of its aspects.¹

SECTION SIXTH.

COUNTERCLAIM, SET-OFF, CROSS-COMPLAINT, AND CROSS-DEMAND.

§ 726. A reference to the statutory provisions collected at the commencement of section first of this chapter shows that some important differences exist among the various codes in respect to the matters stated in the above title. Most of the codes may be separated into two groups, each following a certain well-defined type. The first group contains those which provide for a "counterclaim" and for no other sort of cross-demand, and which adopt the following formula in defining it: "The counterclaim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint [petition] as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." The second group embraces those in which the "counterclaim" is substantially identical with the *first* subdivision of the section just quoted, and in which a "set-off" is also defined in substantial agreement with the *second* subdivision. The following are the formulas adopted in this group: "The counterclaim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the complaint [petition] as the foundation of the plaintiff's claim, or connected with the subject of the action." "A set-off can only

¹ Lancaster, &c. Man. Co. v. Colgate, 12 Ohio St. 344; but, *per contra*, see Campbell v. Routt, 42 Ind. 410, 415, which holds that the same pleading cannot be both a "defence" and a counterclaim:

if it purports to be a counterclaim, and sets up a cause of action, and prays for relief, the defendant cannot treat it as a defence in bar merely.

be pleaded in actions founded on contract, and must be a cause of action arising upon contract, or ascertained by a decision of the court." The codes of Indiana and of Iowa cannot be referred to either of these two general groups: their provisions are quite different in language from the common type, and much broader in meaning. They will be found quoted at large in section first of this chapter.¹ In several of the States a special provision is made for the introduction of new parties made necessary by the pleading of a "counterclaim" or set-off."² The counterclaim in the ordinary form must be in favor of a defendant and against a plaintiff between whom a several judgment on the action is possible. This requirement, as will be seen in the sequel, may sometimes fail of working complete justice between the parties. Thus, for example, when a surety is sued, and a cross-demand against the plaintiff exists in favor of the principal debtor, the surety cannot interpose this claim because it is not in his own favor. To obviate this and similar difficulties, the codes of Indiana and of Iowa have added special provisions covering the class of cases described, and authorizing one defendant, under certain specified circumstances, to avail himself of a counterclaim or set-off existing in favor of a codefendant, when the liability of both to the plaintiff is joint, or one is a surety for the other.³ From a comparison of the various clauses above quoted or referred to, it is plain that the judicial decisions giving a construction to the sections of the codes embraced in the first and second groups can all be used in constructing the full theory of the "counterclaim" which forms so marked and important an element in the new procedure. In all these States, the "counterclaim" singly, or the "counterclaim" and "set-off" taken together, are not only the same in substance, but are defined in almost exactly the same language, so that the interpretation given by the courts of one State can aid in determining the questions which may arise in another. The decisions made in Indiana and Iowa, however, must to a certain extent stand by themselves; for they are based upon statutes which are in many respects special in their terms, and different in their meaning.

¹ See *supra*, §§ 583, 584.

these sections of the statutes are given in full.

² Ohio, §§ 96, 98; Kansas, §§ 97, 99; Nebraska, §§ 103, 105; Indiana, § 68; Iowa, § 2862. See *supra*, § 584 (n.), where

³ Indiana, § 58; Iowa, § 2861. See *supra*, § 584 (n.), for these sections in full.

§ 727. The subject-matter of this section will be arranged in the following order, and distributed into the following subdivisions: I. A general description of the "counterclaim," its nature, objects, and uses. II. The parties in their relations with the counterclaim; including the requirements that the demand must be, 1. In favor of the defendant who pleads it; and, 2. Against the plaintiff; and, 3. When it may be set up in favor of one or some of several defendants, or against one or some of several plaintiffs; that is, when a several judgment may be had in the action between such defendant and plaintiff. III. The subject-matter of the counterclaim, or, in other words, the nature of the causes of action which may be pleaded as counterclaims. This most important subdivision will include several heads: viz., 1. Whether a counterclaim must be a *legal* claim for damages, — like the set-off or the recoupment of the former system, — or whether it may be for equitable or other special relief; 2. When the counterclaim is, or is alleged to be, a cause of action arising out of the *contract* set forth in the complaint or petition as the foundation of the plaintiff's claim; 3. When it is, or is alleged to be, a cause of action arising out of the *transaction* set forth in the complaint or petition as the foundation of the plaintiff's claim; 4. When it is, or is alleged to be, a cause of action *connected with the subject of the action*. The discussion of these topics will require the special examination and interpretation of certain phrases and clauses of the statute, upon the true meaning of which they all to a great extent depend: namely, (*a*) the interpretation of "the foundation of the plaintiff's claim," or when is a contract or transaction "the foundation of the plaintiff's claim"? (*b*) interpretation of "arising out of," or when does a cause of action "arise out of" a contract or transaction? (*c*) interpretation of "transaction," (*d*) and of "subject of the action;" (*e*) and of "connected with the subject of the action," or when is a cause of action "connected with the subject of the action"? Resuming the statement of subordinate heads: 5. In actions founded on contract, a counterclaim founded on another contract, which embraces in particular (*a*) the power of electing between actions in form founded on contract and those in form founded on tort; and (*b*) the requirement that the cause of action must exist at the time when the suit was commenced. IV. Set-off as defined in several of the codes.

V. Certain miscellaneous rules applicable to all counterclaims and set-offs. VI. The special provisions found in the codes of certain States, and especially in those of Indiana and of Iowa. VII. The reply. This arrangement, although perhaps not strictly scientific, is in exact conformity with the order pursued by the statute, and is, therefore, the one best adapted for our present purpose. A full discussion of all the topics mentioned will certainly cover the whole ground, and will develop the complete theory of the "counterclaim" as it appears in the codes.

§ 728. It will materially aid in determining the exact province and scope of the counterclaim if we compare it with the cross-demands in legal actions permitted by the former system of procedure. I shall therefore, by way of preface, and without going into unnecessary details, state the fundamental principles upon which those cross-demands were based, and the general rules which governed their use.

§ 729. *The Cross-Demands allowed by the former Procedure.* The cross-demands in legal actions allowed by the former procedure were "set-off" and "recoupment of damages." Originally the common law acknowledged no such defence or proceeding on the part of a defendant: the primitive notion of an action did not admit the possibility of a defendant being an *actor* and interposing a claim against the plaintiff to be tried in the one suit. The legislature effected the change, and invented the "set-off." Being entirely of statutory origin, the "set-off," when used in actions at law, was necessarily kept within the limits prescribed by the terms of the enactment, and was not extended beyond their fair import. The court of chancery, not acting directly in pursuance of this legislation, but being guided rather by its analogies, was never restricted to its exact provisions, and created an "equitable set-off" broader and more comprehensive than that administered by the courts of law. The original English statute permitted a set-off only in the case of mutual "debts." As this word had a well-known technical meaning in the legal procedure, it served to restrict the use of the set-off to the single class of demands which were at the common law described by the term "debt;" namely, those which arise from contract, and are fixed and certain in their amount. There could not, therefore, be a set-off of general "damages" resulting from the breach of contracts, but only of those claims,

the amount of which had been ascertained and settled by the promise itself, so that there could be no discretion in the jury, and no "assessment" by them. This original notion of the set-off was generally perpetuated in the legislation of the various States prior to the Codes of Procedure; although in some its scope had been enlarged, and made to embrace any pecuniary demand arising from contract, whether "debt" or "damages." Where the original notion was preserved, the exact language of the English statute was not always retained; but its force and effect were not materially changed. I have given in the note an abstract of the New York statute as an example of the legislation, since it does not substantially differ from that of other States.¹

¹ 2 R. S., p. 354, § 18, p. 355, §§ 21, 22; 2 Edm. Stat. at Large, p. 365, § 18, p. 367, §§ 21, 22. The defendant may set off demands which he has against the plaintiff in the following cases: 1. It must arise upon a judgment or upon a contract, express or implied, sealed or unsealed. 2. It must be due to the defendant in his own right, as being the original creditor, or as being the assignee and owner. 3. It must be for the price of real estate or personal property sold, or for money paid, or for services done; or, if not one of these, the amount must be liquidated, or be capable of being ascertained by computation. 4. It must have existed at the time of the commencement of the suit, and must then have belonged to the defendant. 5. The action itself must be founded upon a similar demand which could itself be a set-off. 6. If there are several defendants, the demand must be due to them jointly. 7. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract upon which the suit is founded; in which case no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified. It will be remembered, that, when this statute was passed, things in action were not generally assignable, so that an action could be maintained by the assignee as plaintiff: if actually transferred, the action was brought in the name of the assignor as nominal plaintiff; while the

real owner—the assignee—was not a party to the record. But full transfers were permitted in the case of negotiable paper: the succeeding subdivisions provide for the special circumstances arising when there has been an assignment. 8. In an action on a contract not negotiable, which has been assigned by the plaintiff [the plaintiff, therefore, being a nominal party, and having no real interest], a demand existing against such plaintiff, or against the assignee, at the time of the assignment, and belonging to the defendant before notice of the assignment, may be set off to the amount of the plaintiff's demand [that is, the demand sued upon]. 9. If the action is on negotiable paper, assigned to the plaintiff after it became due, the defendant's demand against the assignor thereof may be set off to the amount of the claim in suit. 10. If the plaintiff is a trustee, or if he has no real interest in the suit, the defendant's demand against the person beneficially interested may be set off to the amount of the claim in suit. In all of these latter cases, the defendant's demand, in order to be a set-off, must fall within the description given in the former subdivisions. If the amount of the set off as established equals the plaintiff's demand, the judgment shall be rendered that the plaintiff take nothing by his action; if it be less, the plaintiff shall have judgment for the residue only. If there be found a balance due to the defendant, judgment shall be rendered for the defendant for the

§ 730. It is not necessary to discuss this statute, nor to cite cases illustrating its meaning. It has been displaced by the more comprehensive provisions of the code. It is clear that if the plaintiff's action was on a contract and for a "debt," — for the more extended language of the statute describes only a "debt," — and the defendant held another "debt" due from the plaintiff personally, and existing in his own favor, and which did so exist at the commencement of the action, he could plead such demand as a set-off; and if it exceeded the amount of the plaintiff's claim, he could have judgment against the plaintiff for the surplus. Also in an action for the same kind of demand, brought by a plaintiff who had really assigned the claim, and was therefore a nominal party only, or brought by a plaintiff who was a trustee, or sued on behalf of another person, or brought by an assignee of negotiable paper transferred after it became due, the defendant might set off a similar kind of demand which he had against either the assignor or the assignee in the first case before notice of the assignment, or against the beneficiary in the second case, or against the assignor in the third case; but he could not by such set-off do more than defeat the plaintiff's recovery: he could not have a judgment for any balance due to himself. The reason for this latter rule is very plain; for in neither of these cases was the plaintiff *the real party in interest and the debtor at the same time*.

§ 731. While set-off was entirely of statutory origin, the doctrine and practice of "recoupment of damages" had their inception in the law of judicial decision. From the notion of absolute non-performance as a total defence, the progress was easy and natural, through the partial defences of a part performance and a reduction of damages by means of unskilful or negligent performance, to the admission of a cross-demand in favor of the defendant for damages resulting from the acts or omissions of the plaintiff that amounted to a breach of the contract sued upon. In this manner the doctrine of recoupment took its rise, and it was developed by decision after decision until it became established in the courts of England and of the American States, — a defence as well known and as widely admitted within its scope as the statutory

amount thereof; except that no such judgment shall be rendered against the plaintiff when the contract upon which the suit is founded shall have been as-
signed before the commencement of the suit, nor when the balance is due from any other person than the plaintiff in the action.

set-off. There were resemblances and dissimilarities between these two defences. Both were confined to actions upon contract, and must themselves arise from contract ; but here the resemblance ends. A set-off must be for a debt, a fixed certain sum, at least capable of being ascertained by computation : recoupment was of damages, often entirely unliquidated, and depending upon an assessment by a jury. A set-off was necessarily a demand arising upon a different contract from the one in suit : recoupment was necessarily of damages resulting from a breach of the very same contract sued upon. In set-off the defendant might sometimes recover a balance from the plaintiff : in recoupment this could never be done. The doctrine may be summarily stated. In an action upon a contract to recover either liquidated or unliquidated damages or a debt, the defendant might set up by way of defence and recoup the damages suffered by himself from any breach by the plaintiff of the same contract. At an early period it was supposed that only damages arising from the plaintiff's fraud in inducing the defendant to enter into the contract, or in executing the same, could be recouped ; but it was subsequently settled that fraud was not a necessary element, and that any breach by the plaintiff of the same contract which he makes the basis of his action would admit the defence of recoupment. The rule was stated in the following manner in a case which arose a short time before the new system of procedure was adopted : " It cannot be denied, consistently with the doctrine now well established, but that, in an action for a breach of contract, the defendant may show that the plaintiff has not performed the same contract on his part, and may recoup his damages for such breach in the same action, whether they were liquidated or not, or may at his election bring a separate action." ¹ Recoupment was, however, used solely as a defence : it could do no more than defeat the plaintiff's recovery ; even though the defendant's damages should exceed those proved by the plaintiff, he could have no judgment for the surplus. ²

§ 732. The nature, scope, and intent of the doctrine may be illustrated by a statement of some familiar instances in which recoupment was used ; and it will be readily seen in all of them

¹ *Mayor v. Mabie*, 13 N. Y. 151, 153, *Peirce*, 8 Hill, 171 ; *Murden v. Priment*, per Denio J. ; and see *Batterman v.* 1 Hill. 75.

² *Sickels v. Pattison*, 14 Wend. 257.

that the defendant's demand was based upon a breach of the contract which was the foundation of the action, although often of other stipulations or covenants in that agreement than the one which it was alleged he himself had broken. Thus, in an action brought to recover the price of land, the defendant could recoup the damages arising from the plaintiff's fraudulent representations concerning the land by which he had been induced to enter into the contract;¹ and in an action for the price of goods sold, damages resulting from the plaintiff's breach of a warranty on the sale;² and in an action for services, damages from the negligent or unskilful manner of their performance;³ and in an action on a lease for rent or use and occupation, damages from the plaintiff's breach of a covenant to repair, or covenant for quiet enjoyment;⁴ or damages from the plaintiff's fraud in inducing defendant to enter into the lease.⁵ But recoupment is confined to damages from a breach of the contract sued on.⁶ The same doctrine, which has thus far been illustrated exclusively from New York cases, prevailed in the other States to the same extent, and perhaps, in some of them, had even a wider application. A very few examples will suffice. In an action upon a promissory note, the answer alleging that the note was given by the defendant for the price of the plaintiff's services in constructing and mounting a water-wheel, and that the work was done and the wheel made and mounted in a very negligent and unskilful manner, to the defendant's damage, was held to state a proper case for a recoupment of defendant's damages;⁷ and in an action upon a sealed agreement to recover an amount due for certain sawing done by the plaintiff in pursuance thereof, and also damages from the defendant's failure to furnish the stipulated number of logs to be sawed, damages arising from the plaintiff's breach of other covenants were recouped;⁸ and damages from the plaintiff's failure to build according to the specifications were permitted to be recouped in an action for the price.⁹ In Indiana,

¹ *Van Epps v. Harrison*, 5 Hill, 68.

² *Reab v. McAlister*, 8 Wend. 109.

³ *Blanchard v. Ely*, 21 Wend. 342; *Sickels v. Pattison*, 14 Wend. 267; *Still v. Hall*, 20 Wend. 51; *Ives v. Van Epps*, 22 Wend. 155.

⁴ *Whitbeck v. Skinner*, 7 Hill, 58; *Dorwin v. Potter*, 5 Denio, 806; *Mayor v. Mabie*, 18 N. Y. 151.

⁵ *Allaire v. Whitney*, 1 Hill, 484;

Whitney v. Allaire, 1 N. Y. 805; 4 Denio, 554.

⁶ *Seymour v. Davis*, 2 Sandf. 289; *Deming v. Kemp*, 4 Sandf. 147; *Terrell v. Walker*, 66 N. C. 244, 251.

⁷ *Butler v. Titus*, 13 Wisc. 429.

⁸ *Morrison v. Lovejoy*, 6 Minn. 319.

⁹ *Mason v. Heyward*, 8 Minn. 182.

where the defendant had given a note for the purchase-price of land sold him by the payee, and the latter had afterwards wrongfully entered upon the land and taken and converted the growing crops, it was held in an action upon the note that the damages resulting from these wrongful acts of the plaintiff could not be recouped, since they were independent trespasses, and not breaches of the contract.¹ The doctrine was applied in Missouri to the following facts: The action was brought to recover rent of a farm leased to defendant by a verbal agreement: the answer set up, that, by further provisions of the same contract, the plaintiff stipulated to build and maintain a fence between the premises leased and other land occupied by himself; that he neglected to build the fence, and, by reason of his neglect, his cattle came upon defendant's farm, and destroyed crops thereon. The damages thus sustained were held to be the proper subject of recoupment.²

§ 733. Another species of defence, which existed at the common law and still exists, is sometimes confounded with recoupment or with counterclaim, although it bears no real resemblance to either, and should be carefully distinguished from both; namely, the reduction of the amount claimed to be due in suits for the price of goods sold or of services rendered in most instances when the action is on a *quantum meruit* or *quantum valebant*. In set-off and in recoupment, the essence of the defence consists in a cause of action against the plaintiff or some other person: whether a judgment is recovered or not is immaterial, but a right of action always lies at the bottom of the legal notion. In the defence referred to, there is no such right: it is simply a process of subtracting from the amount of the adverse claim, and therefore operates directly upon that demand. Set-off and recoupment, on the other hand, do not attack the adverse claim itself; and for that reason it is often said that they are not true *defences*: they admit the plaintiff's cause of action, and set up an affirmative cross-demand, so that the sums awarded for each may satisfy one another, leaving only a surplus to be received by the party who obtains the larger amount. The distinction is very plain; but it has sometimes been overlooked. One example will be a sufficient illustration. In an action for the price of goods sold

¹ Slayback v. Jones, 9 Ind. 470.

² Hay v. Short, 49 Mo. 139, 142.

and delivered, and of work and labor done amounting as alleged to \$197, the answer set up that the goods furnished and the work done were worth no more than \$173, and as to that sum averred payment. On the trial, the defendant offered evidence tending to show that the articles were to be of a certain kind and quality; that they were, on the contrary, very inferior in quality; and the consequent diminution in value and price. This evidence was rejected on the ground that the reduction sought could only be claimed by way of "recoupment of damages or of set-off." The New York Court of Appeals, reversing this ruling, pronounced the defence admissible, since it was in no sense a claim for damages against the plaintiff, but simply a diminution of the value of the goods and the labor, as that had been established *prima facie* by the plaintiff.¹ The same principle applies through the whole range of possible defences, under whatever forms they may be set up: if they simply attack the cause of action, and show that *by virtue thereof* the plaintiff ought not to recover at all, or recover all that he demands, they are not, and cannot be, answers in the nature of "set-off" or "recoupment" under the old system, or of "counterclaim" or "cross-demand" under the new. Thus the defence of payment cannot, by any mode of averment, be made a counterclaim;² nor that of usury.³ And generally, whenever the facts pleaded are merely in bar of the action, and the relief demanded by the defendant is only what would be the legal judgment in his favor upon those facts, the answer is not a counterclaim, nor, *a fortiori*, a cross-complaint, although it may be in the form of the latter species of pleading.⁴ From this preliminary statement of the former defences which contained some of the elements that are found in the modern counterclaim, and of others which have nothing in common with, but are sometimes mistaken for, the counterclaim, I now proceed to a direct discussion of the latter as it is defined and authorized by the codes, and shall follow the order of treatment already indicated.

¹ *Moffet v. Sackett*, 18 N. Y. 522.

² *Burke v. Thorne*, 44 Barb. 363.

³ *Prouty v. Eaton*, 41 Barb. 409, 412,
per T. A. Johnson J.

⁴ *Bledsoe v. Rader*, 30 Ind. 354; *Bel-
leau v. Thompson*, 33 Cal. 495.

I. *A General Description of the Counterclaim; its Nature, Objects, and Uses.*

§ 734. Under this subdivision I shall collect from leading judicial decisions such opinions, and portions of opinions, as have in the clearest and most accurate manner described the general nature, objects, and uses of the counterclaim, and shall add the comments and explanations that seem necessary to a full development of the subject. The discussion is here confined to the *general* properties of the counterclaim, and does not descend to its various special elements and features, which, depending upon the particular terms of the statutes, demand a more critical examination.

§ 735. There are certain conclusions which are evident upon the mere reading of the statute. Under the former procedure, the term "set-off" included two quite distinct classes of cases: namely, (1) those in which the defendant might recover an affirmative judgment for a "debt" against the plaintiff; and (2) those in which the demand in his favor could only be used *defensively* to diminish, or perhaps defeat, the recovery by the plaintiff. The codes provide for both these classes of cases. Those sections which permit the action to be brought by an assignee of a thing in action, and allow under certain circumstances the same matters to be interposed as a *defence* against him which would have been available against the assignor, and those sections which permit the action to be brought by a trustee of an express trust, and allow the same matters to be set up as a defence against him which would have been available against the party beneficially interested, — these sections plainly embrace the second class of "set-offs" above mentioned; namely, those in which the demand could be used as a *defence*, but not as the basis of an affirmative recovery against the plaintiff. On the other hand, these cases are not included within the description given of a counterclaim. A defence, even though it consists of a claim for relief *against some person*, but does not permit a recovery against the *plaintiff*, is *not* a counterclaim. The first class of "set-offs" above mentioned is embraced within the definition of the counterclaim as given by those codes which constitute the first group according to the division made in a former paragraph.

In the codes which constitute the second group, the same class of "set-offs" is substantially described under the original name which belonged to that species of answer in the old procedure.

§ 736. The "recoupment of damages" has undergone a most important modification. It is confessedly covered by the definition of counterclaim given in all the codes without exception. In those forming the two principal groups according to the classification heretofore made, it is described by the express language, "a cause of action arising out of the contract set forth in the complaint [or petition] as the foundation of the plaintiff's claim;" in that of Indiana it is described by the language, "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages;" and in that of Iowa by the language, "a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract set forth in the petition." It is beyond dispute, then, that the recoupment of damages, as the same was authorized by the courts under the old practice, is made a species of counterclaim by all the codes. But its effects have been greatly enlarged. As it has been transferred into a counterclaim, it partakes of all the essential features conferred upon that kind of defence by the statute. For this reason, the defendant, who would formerly have set up the facts in recoupment of damages, and who now pleads the same facts as a species of counterclaim, may upon the basis of those facts obtain a judgment for damages in his favor against the plaintiff, if the proofs upon the trial warrant such a result.

§ 737. The two classes of affirmative relief mentioned in the foregoing paragraphs, important as they are, do not exhaust the scope and efficacy of the counterclaim. The causes of action which were the basis of a "recoupment of damages" or of a "set-off," as those terms were legally defined, all necessarily arose from a breach of contract. The language employed by the codes speaks of causes of action as constituting a counterclaim, which do not arise out of contract. It mentions three alternatives, — causes of action (1) arising out of the *contract* set forth in the complaint, or (2) arising out of the *transaction* set forth in the complaint, or (3) *connected with* the subject of the action.

Unless we would accuse the legislature of the most absurd and misleading tautology, this language was intended to affirm that there may be counterclaims which do not arise out of contract. Arising out of the "transaction," and "connected with the subject of the action," are placed in opposition to "arising out of contract." As "recoupment of damages" and "set-off" must be based upon the non-performance of a contract, it follows that the counterclaim was designed to include other demands to which neither of these two terms can apply. What are these other demands? I do not now attempt to answer this question in detail: it is enough to point out the general nature of all such possible cases. If causes of action are for the recovery of money only, they must either be upon contract or for a tort. Is there any possible cause of action upon contract, which is neither a "set-off" nor a "recoupment of damages," and which may be embraced within the definition of a counterclaim? There is: a cause of action for the breach of a contract other than the one sued upon, when the demand is for damages merely, to be assessed by the jury, and not for a debt, is neither a "set-off" nor a "recoupment," and yet is plainly described by the second subdivision of the definition found in all the codes which form the first group, and by the definition of "set-off" found in all those which make up the second group. As the word "transaction" seems to imply causes of action not necessarily upon contract, those arising from tort may perhaps, under proper circumstances, be the subject of counterclaim; but the discussion of this particular question will be deferred to a subsequent part of this section. I will now sum up the possible cases, or classes of cases, which may be included within the broad definition of the counterclaim as given in the codes of the first group: if we pass to the second group, certain of these classes would fall within the term "set-off" rather than counterclaim. Of the causes of action which terminate in a recovery of money alone, the counterclaim expressly embraces (1) the matters which under the former procedure gave rise to a recoupment of damages; (2) the cases of "set-off" in which a judgment for debt against the plaintiff was possible; (3) demands to recover unliquidated damages for the breach of a contract not the foundation of the plaintiff's suit; and possibly (4) demands to recover damages for torts, if the same arose out of the "transaction" set forth in

the complaint or petition, or are connected with the subject of the action. These exhaust all the possible instances of a mere pecuniary recovery. Counterclaim may also embrace cases of an equitable nature in which affirmative relief is granted to the defendant. Such cases are as plainly described by the general language of the codes as those of a purely legal character which seek only a pecuniary judgment. In order to shut out these claims for equitable relief, and to limit the counterclaim to causes of action for the recovery of money, the terms of the statute must be read with restrictions interpolated into their midst which were not placed there by the legislature. Were it not that the ancient set-off and recoupment could only be used in legal actions brought to recover money, no judge would have thought that a like limitation must be put upon the language of the codes. How far the counterclaim includes equitable relief will be fully discussed in the sequel. Finally, the only other cases which could possibly come within the definition of counterclaim are legal causes of action to recover possession of lands, or to recover possession of chattels.

§ 738. Having thus enumerated the different kinds of causes of action and of relief which may be used by the defendant as counterclaims, I shall proceed to point out some essential features and elements which must exist in each of these cases; that is, some essential elements which enter into the very notion of the counterclaim. (1.) It must be a cause of action. In other words, the facts must be such that they would constitute the entire matter proper and necessary to be set forth in the complaint or petition, if the defendant had chosen to institute an independent action between himself as plaintiff and the plaintiff as defendant. When a counterclaim is pleaded, the defendant becomes, as far as respects the matters alleged therein, an *actor*: there are substantially two simultaneous actions pending between the same parties, each of whom is at the same time a plaintiff and a defendant. Since the counterclaim states a cause of action, it is to be governed and judged by the rules which apply to the complaint or petition: the facts alleged must be sufficient to constitute the cause of action, and the relief to which the defendant is entitled should be properly demanded. In short, the pleader should, for the time being, regard himself as acting for a plaintiff, and as drawing a complaint or petition. This rule is so

simple and so plain, that it seems almost impossible to mistake it; and yet the books of reports are full of cases in which facts have been set up as counterclaims, which, if admitted to be true, would not have entitled the party pleading them to any relief. The test thus suggested is of universal application. Would the facts averred taken by themselves, if admitted, entitle the defendant to a judgment in his favor against the plaintiff? If not, they do not constitute a counterclaim.

§ 739. It has sometimes been said that "counterclaim," *ex vi termini*, implies a claim, and also an opposing claim; and that, therefore, there cannot be a valid counterclaim unless there is a demand on behalf of the plaintiff. This is no doubt true within certain limits. The counterclaim as well as the defence assumes that the plaintiff sets up a claim in his complaint. There could be no answer of any kind, defensive or affirmative, unless the plaintiff in the first instance filed or served a pleading containing some demand. But a counterclaim does not necessarily imply that the demand is a valid one. The term, if not invented, was applied by the legislature to this species of answer, which is allowed to be used in cases where the plaintiff sets up certain specified causes of action; but the code nowhere requires that the cause of action thus *alleged* should be a good one. To interpolate any such limitation into the language of the statute would be giving an unnecessary meaning to a very simple epithet chosen by the lawmakers to designate a particular kind of pleading. The plaintiff must file a complaint averring facts which are said to constitute a cause of action in his favor. The defendant is expressly permitted to unite in his answer as many defences and counterclaims as he may have. Suppose that he pleads some defence either by way of denial or of new matter, and also a counterclaim. On the trial he establishes his defence, and thus defeats the plaintiff's recovery upon the alleged cause of action. Does this success cut off his power to go on and prove the facts constituting his counterclaim, and to obtain the judgment thereon? Such a conclusion would be a monstrous perversion of the statute, and would be a virtual repeal of its express provisions which permit the defendant to unite as many defences and counterclaims as he may have. When the legislature authorized him to join defences and counterclaims in this manner, it certainly intended that he should use them all, and did not mean that he

should go through the empty form of pleading them, and afterwards abandoning those which are affirmative in their nature because successful in those which are negative. This conclusion is self-evident: it necessarily results from the positive provisions of the codes, and cannot be avoided without their virtual repeal. I have dwelt upon this subject at some length, not because there can be any legitimate and well-founded doubt concerning it, but because there are certain judicial *dicta* in a few cases which are supposed to convey a different meaning.¹

§ 740. (2.) The cause of action thus alleged must exist in favor of the defendant who pleads it. As the counterclaim is defined in nearly all the codes, a defendant is not permitted to set up facts which entitle any other person, defendant or otherwise, to relief. He himself must be the party entitled to the judgment demanded, so that he would be the proper plaintiff, or one of the proper plaintiffs, if the cause of action had been made the basis of an independent suit. It is not, of course, to be understood that a counterclaim must always exist in favor of a single defendant: two or more, when sued jointly, may have a joint cause of action against the plaintiff; in which case it might be, and properly should be, pleaded as a counterclaim by them all. To the general rule above stated there is an exception already pointed out in the codes of Indiana and of Iowa, which permits a surety when sued to take advantage of a demand against the plaintiff in favor of his principal, and a joint debtor, when sued, to interpose one in favor of another joint debtor.

§ 741. (3.) The cause of action must exist against the plaintiff in the suit, so that a judgment for the relief demanded can be rendered against him. This feature of the counterclaim is evident upon the most cursory reading of the statutory provision; and yet the books are full of cases in which matters have been

¹ See *Mayor v. Parker Vein, &c. Co.*, 12 Abb. Pr. 800; 8 Bosw. 300; *Bellinger v. Craigie*, 81 Barb. 534; *Prouty v. Eaton*, 41 Barb. 409. It is settled, however, in Minnesota, that a counterclaim must of necessity admit the cause of action set up by the plaintiff, and that the defendant cannot deny this cause of action, and, at the same time, plead a counterclaim. In one case, the court said: "The nature of a counterclaim would seem to render necessary the admission by defendant of a

claim against him in favor of the plaintiff arising out of the contract or the transaction, as the case may require, which is the cause of action, or the ground of the plaintiff's claim set forth in the complaint." All claim of the plaintiff being denied, it was held there could be no counterclaim. *Steele v. Etheridge*,* 15 Minn. 501, 509; *Mason v. Heyward*, 8 Minn. 182; *Whalon v. Aldrich*, 8 Minn. 343, 348; *Koempel v. Shaw*, 13 Minn. 488; *Morrison v. Lovejoy*, 6 Minn. 319.

set up as counterclaims that showed no cause of action whatever against the plaintiff, but one (if at all) existing against some other person not a party to the suit. This error is most likely to arise in actions brought by an assignee of a demand, where the defendant has a claim which would be valid against the assignor. Such claim may, under some circumstances, constitute a perfect defence to the suit, and it may be a set-off according to the provisions of statutes prior to the code ; but it cannot be a counterclaim, for the simple but most cogent reason that it does not entitle the defendant to any possible recovery against the plaintiff.

§ 742. (4.) In reference to their subject-matter, the codes which form the first group separate counterclaims into two general classes : namely, *first*, those which arise out of a cause of action different from the one alleged by the plaintiff ; and *secondly*, those which arise out of or are connected with the same cause of action as the one alleged by the plaintiff. In the first of these classes the cause of action stated by the plaintiff must spring from contract, and the counterclaim must arise out of another contract. These counterclaims are identical with the "set-off" of the codes which belong to the second group, and they embrace, but are not restricted to, the "set-offs" used in the former procedure. They include that ancient "set-off," and also much more ; for they cover all cases of *damages* as well as of *debt* resulting from the non-performance of contracts ; and, according to the construction supported by the overwhelming weight of authority, they also extend to cases of equitable relief arising from contract. In the second of these classes the cause of action that may be set forth by the plaintiff is not defined or limited in any manner, and may therefore, unless limitations not contained in the statute are to be interpolated by the courts, be of any kind and nature. The counterclaim, however, is restricted in its scope and character, and must conform to one or the other of three requisites : (a) If a contract is set forth in the complaint or petition as the foundation of the plaintiff's demand, the counterclaim must arise out of that same contract ; and this plainly embraces the ancient recoupment of damages, although far broader in its operation than that species of defence. (b) If a "transaction" is set forth as the foundation of the plaintiff's demand, the counterclaim must arise out of that "transaction ;" and, so

far as "transaction" is something different from or additional to "contract," this is a provision not identical in its effect with either "set-off" or "recoupment:" it clearly embraces many instances of equitable cross-demand and relief in favor of the defendant; and the only real doubt is, whether it extends also to legal causes of action. (c) Whatever be the nature of the claim asserted by the plaintiff, — for the codes contain no restriction in respect of this matter, — any counterclaim may be pleaded "which is connected with the subject of the action." I have thus given a simple analysis of the statutory provision, taking the language as the legislature has used it without modification, neither adding to nor subtracting from it. If the courts have at any time placed further limitations upon the scope and operation of the counterclaim, if they have ever refused to admit the broad and comprehensive classification here made, they have done so by narrowing the general language of the statute, and restricting its obvious import. How far judicial decisions have gone in this process of limitation, and how much authority should be conceded to their interpretation, I shall attempt to ascertain and to determine in subsequent portions of this section. My sole object now is to let the statute speak for itself by presenting an analysis and arrangement of its various clauses. It is certain, from this inspection of its very language, that there is no *express* restriction upon the nature and effect of the relief which may be demanded and obtained by means of a counterclaim, — no express requirement that it must be legal rather than equitable, nor that it must be confined to a money judgment in the form of debt or damages. Nor is there any express provision that the counterclaim must be something essentially antagonistic to, or tending to defeat or lessen, the cause of action set forth by the plaintiff in his complaint or petition. It will be seen, in the further discussions of this section, that the incident last mentioned is declared by several carefully considered decisions to be a necessary element or feature of the counterclaim, implied in its very nature and in the name given to it by the legislature. I do not question the correctness of this conclusion: I merely call attention to the fact, that, in reaching it or any similar result, the courts have added to or taken from the express terms of the codes.

§ 743. I shall now collect the opinions of several eminent and able judges, selected from a number of leading cases, in order

that the reader may be able to compare their conclusions with the results of the foregoing analysis, and to ascertain the general principles upon which the courts have proceeded in constructing the theory of the counterclaim as it is now understood and accepted in the various States. These selections and quotations will be found in the foot-notes.¹ The assignee of a demand having brought suit upon it, the defendant alleged as a counterclaim a contract with the assignor, a breach thereof by him, and resulting damages, and prayed judgment for the amount of such damages against the defendant. No reply being served to this answer, the defendant urged that its averments were admitted, and that he was entitled to judgment on the record. In rejecting his claim, the New York Court of Appeals described the counterclaim at large, and stated principles of universal application.²

¹ *Leavenworth v. Packer*, 52 Barb. 182, 186, per Potter J.: "A counterclaim is a kind of equitable defence which is permitted, under the provisions of the code, to be set up, when it arises out of the contract set forth in the complaint. It is broader and more comprehensive than recoupment, though it embraces both recoupment and set-off; and it is intended to secure to a defendant all the relief which either an action at law, or a bill in equity, or a cross-suit, would have secured on the same state of facts. But it must be something which resists or modifies the plaintiff's claim." See also *Clinton v. Eddy*, 1 Lans. 61, 62; *Boston Mills v. Eull*, 6 Abb. Pr. n. s. 819, 821; *Pattison v. Richards*, 22 Barb. 143, 146; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Gleason v. Moen*, 2 Duer, 689, 642; *Schubart v. Harteau*, 34 Barb. 447; *Lignot v. Redding*, 4 E. D. Smith, 285; *Currie v. Cowles*, 6 Bosw. 453; *Wolf v. H.*, 13 How. Pr. 84; *Davidson v. Remington*, 12 How. Pr. 310.

² *Vassear v. Livingston*, 18 N. Y. 248, per Denio J.: "There is nothing in the nature of a counterclaim stated in the answer. There was never any contract between the plaintiff and the defendant; and although the new matter was, if true, very pertinent to preclude the plaintiff from recovering upon the demand assigned to him, it had no tendency to show an independent cause of action in favor of the defendant against the plaintiff.

Section 150 of the code defines a counterclaim. It must be a claim existing in favor of the defendant against the plaintiff, arising either out of the contract or transaction sued upon, or some other contract. Here the defendant had no claim against the plaintiff. If the facts were truly stated, he had grounds for defending himself against the plaintiff's suit, but none whatever for an independent recovery against him. A counterclaim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant. It is quite obvious that nothing of that nature is stated in this answer." In the same case, the court below, after stating the doctrine in a similar manner, added: "A counterclaim which is not also a set-off is not a defence. It is a distinct and independent cause of action, which is not used simply to repel the claims of the plaintiff, but for which a judgment against him is in all events demanded. Previous to the code, it could not be set up by the defendant at all; and the permission to set it up in an answer, although with a change of its name, assuredly has not changed its legal character. A recoupment or a set-off is a defence; but a defendant who avails himself of such a defence admits, in whole or in part, the demand of the plaintiff as alleged in the complaint." S. C. 4 Duer, 285, 293, per Duer J. See also *Merrick v. Gordon*, 20 N. Y. 93, 97, per Comstock J.

§ 744. The doctrine is maintained in several cases, that, as an essential feature or element of every counterclaim, the cause of action which it sets up must be of such a nature that the relief obtained by its means will necessarily interfere with, defeat, lessen, or modify the relief granted to the plaintiff in virtue of the cause of action alleged in his complaint or petition. In other words, the two demands must be, to some extent at least, antagonistic, and tending to destroy or limit each other. In an action brought to foreclose a mortgage upon land, the holder of the legal title, to whom the premises had been conveyed by the mortgagor, was made a defendant; but no personal judgment for the debt was demanded against him in the complaint, and he was notified to that effect in the usual manner. He pleaded a counterclaim, setting up the following facts: that the plaintiff conveyed the land to the mortgagor by a deed, with full covenants of title; that the mortgagor conveyed the same premises to the defendant by a similar deed, and also assigned the plaintiff's covenants and all rights of action for their breach; that said covenants had been broken by the existence of an outstanding paramount title and prior incumbrances, and the defendant had been evicted under the same, to his great damage, for which damages judgment was demanded against the plaintiff. Evidence in support of this answer was excluded at the trial, and the defendant appealed. The New York Court of Appeals, sustaining the ruling below, announced the doctrine that the demands of the plaintiff and of the defendant must be reciprocal, in order that there can be any place for a counterclaim.¹ In an action to recover the price of goods

¹ National Fire Ins. Co. v. McKay, 21 N. Y. 191, 195, per Comstock J.: "Upon the defendant's own statement, I do not see that any thing was in litigation between him and the plaintiff, or that any judgment could be rendered against him except one for costs for interposing a groundless defence to the action. No cause of action existed against him. The complaint claimed nothing against him personally, and stated no facts as the foundation of such a decree. The answer showed that he had no title or interest in the mortgaged premises to be affected by the decree. His defence must therefore be deemed to have been put in for the mere purpose of establishing a le-

gal cause for an independent suit on the plaintiff's covenants, without any demand against himself being at all involved in the controversy. Without undertaking at this time to expound the provisions of the code which relate to the counterclaim, I am satisfied that they do not apply to such a case as this. Of course the claim could only be enforced in this case by a judgment in the defendant's favor for the damages sustained in consequence of the eviction. But the plaintiff might, notwithstanding such a judgment, be entitled to a decree for a foreclosure and sale. The alleged counterclaim does not impair or affect the right to that relief. I apprehend that a counterclaim, when estab-

sold and delivered, the answer contained a so-called counterclaim which purported to show that the plaintiff held lands under a deed of trust which he was in equity bound to convey to the defendant, and prayed a judgment directing such conveyance. The Supreme Court in New York decided that these facts, if properly pleaded, would not constitute a counterclaim in opposition to the cause of action stated in the complaint; and directly held the doctrine that a counterclaim must in some sort defeat the plaintiff's recovery, or interfere with the judgment that would otherwise be rendered in his favor.¹

§ 745. These cases must be considered as establishing the doctrine, that the defendant's cause of action, in order to constitute a valid counterclaim, must to some extent defeat, modify, qualify, or interfere with, the relief which would otherwise be obtained by the plaintiff. The sweeping statements and broad generalities of the opinions ought, however, to be limited within their proper bounds, by pointing out the only possible instances in which the principle can apply. It is said by one of the judges that the

lished, must in some way qualify, or must defeat, the judgment to which the plaintiff is otherwise entitled. In a foreclosure suit, a defendant who is personally liable for the debt, or whose land is burdened by the lien, may probably introduce an offset to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, I do not see how he can demand a judgment against the plaintiff on a bill, or a note, or a bond, or a covenant. Such is virtually this case. The defendant has, as he insists, a cause of action against the plaintiff upon a broken covenant; but that cause of action, if it exists, does not enable him to resist or modify the relief to which the plaintiff is entitled." See also *Agate v. King*, 17 Abb. Pr. 159 (Gen. Term, 1862). An action to foreclose a mortgage against K. and others. K. owned the land, but was not personally liable for the debt, and no personal judgment against him was demanded. He set up, as a counterclaim, a demand for \$6,000 damages arising from a breach by the plaintiff of a distinct contract to convey land. This was held not to be a counterclaim: it clearly did not

fall under the first subdivision: it did not fall under the second subdivision, because, in an action to foreclose a mortgage as against all the defendants except the one personally liable, the cause of action does not arise out of contract; and also because no judgment was asked against K. Some portions of the opinion do not agree with the reasoning of Comstock J. quoted above: while the decision reached is in harmony with that case, the *dicta* of the judge are not entirely so. And see *Carpenter v. Leonard*, 5 Minn. 155.

¹ *Mattoon v. Baker*, 24 How. Pr. 329, 381 (Gen. Term), per Bockes J. After reciting the allegations as given above, the opinion proceeds: "Would this constitute a defence to the plaintiff's action for goods sold? Clearly not. Nor would it be such a counterclaim as the defendant would have a right to interpose by way of answer to the plaintiff's alleged grounds of action. Such equitable claim for relief would afford no answer to the plaintiff's claim for judgment. He would still be entitled to recover according to the allegations of his complaint, without any deduction even on account of the matters stated in the answer. A counterclaim, to

counterclaim "must consist in a set-off or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint." This rule could only be broken by counterclaims belonging to the second subdivision. In respect to all those falling within the first subdivision, they all, by the very terms of the definition, arise out of the same contract or transaction set forth in the complaint, or they are connected with the subject of the action. There is, therefore, in this class, no room for a possible violation of the rule laid down by the learned judge. The counterclaim must, from its very nature, be con-

be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must therefore consist in a set-off, or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint. It must present an *answer* to the plaintiff's demand for relief; must show that he is not entitled, either at law or under the applications of just principles of equity, to judgment in his favor, as, or to the extent, claimed in the complaint. It must therefore contain, not only the substance of what is necessary to sustain an action in favor of the defendant against the plaintiff, but it must also operate in some way to defeat, in whole or in part, the plaintiff's right to recover in the action. An answer which does not meet this requirement is insufficient, whether regarded as a defence or as a counterclaim. If a person be sued on a promissory note, he cannot set up, by way of defence or counterclaim, a contract with the plaintiff for the purchase of lands, and allege payment of the purchase-price, and claim a decree in the action for a specific performance; nor could he, in such an action on a promissory note, have a foreclosure of a mortgage against the plaintiff, especially if the latter were not personally liable for the mortgage-debt." The same principle was again approved by the New York Court of Appeals in a recent decision. "Counterclaim," it was said, "is a new term introduced into the code, and which is limited and defined therein. When the action is upon contract, unless the counterclaim arises out of the contract or transaction set forth in the complaint as

the foundation of the plaintiff's claim, or be connected with the subject of the action, it must be a legal or equitable cause of action against the plaintiff arising upon contract, and existing at the commencement of the action. It is manifest, however, that every cause of action existing in favor of the defendant against the plaintiff, arising upon contract, cannot be the subject of a counterclaim. It must be a cause of action upon which something is due the defendant which can be applied in diminution of the plaintiff's claim. For instance, a cause of action for the specific performance of a contract in reference to real estate arises upon contract, and yet cannot be set up as a counterclaim, unless it grew out of, or is connected with, the cause of action alleged in the complaint. . . . The object of introducing counterclaims into the practice under the code was to enable parties to settle and adjust all their cross-claims in a single action as far as they could." *Waddell v. Darling*, 51 N. Y. 327, 380. See also *Pattison v. Richards*, 22 Barb. 143, 145. This doctrine was fully approved and adopted by the Supreme Court of Wisconsin in the very recent case of *Dietrich v. Koch*, 35 Wisc. 618, 626. In the case of *Cavalli v. Allen*, 57 N. Y. 508, which was an action to recover the possession of land, brought by a vendor against the vendee in possession, on the ground that a balance of the purchase-price remained unpaid, the defendant was permitted to set up as a counterclaim a note which he held against the plaintiff, and thus to extinguish the amount due on the land contract.

nected with the subject of the action; and therefore the relief demanded by it and that prayed for by the plaintiff cannot be entirely independent of each other. It is in counterclaims of the second subdivision alone that the doctrine can be employed and applied with any practical results. And, of these cases, it is plain that all those in which the complaint and the counterclaim both demand a money judgment comply with the rule. It is only when one or the other seeks to recover some equitable relief that its violation becomes possible. The limitation thus established by the New York courts may be, and probably is, correct; but at the same time it is a judicial interpolation into the statutory language which contains no such restriction. The legislature has said: "When the action arises on a contract, *any other cause of action* also arising on a contract may also be a counterclaim." What grant of authority could be clothed in more *general* terms than this? The courts, however, say, "It is not true that *any other cause of action* arising on contract may be a counterclaim: it must be connected with the subject of the action, and must operate in some way to defeat, in whole or in part, the plaintiff's right of recovery." This mode of interpretation, when carried beyond very narrow limits, becomes a usurpation of the law-making function, and an actual repeal of statutory provisions.

§ 746. The decisions made by the courts of other States present the same general notions in respect to the nature and scope of the counterclaim.¹ In Wisconsin the counterclaim is recognized to the fullest extent as including relief of an equitable nature, and as being available in actions brought to obtain specific remedies, such as those affecting or establishing the plaintiff's title to land. In a suit to quiet title to land, the plaintiff alleged his possession and claimed his title under a certain tax-deed, which, with all the proceedings in relation thereto, was particularly described. The defendant answered by way of counterclaim that *he* was in possession and asserted his title under another tax sale and deed, which, with the proceedings, was sufficiently set forth. He prayed judgment that the title might be decreed to be in himself. This answer was held to be a good counterclaim, the court declaring that it conformed in every particular with the definition

¹ See *Allen v. Shackelton*, 15 Ohio St. 145, 147, per Wilder J.; *Hill v. Butler*, 6 Ohio St. 207, 216, per Swan J.

given by the code.¹ The Supreme Court of Missouri has also described the counterclaim in entire conformity with the judicial definitions already given.² The language of the provision in the Indiana code is somewhat broader than that which is found in most of the other codes. The interpretation put upon it, however, will aid in ascertaining the general spirit and object of the entire legislation which introduced this class of defences. In an action to rescind a conveyance of land made by the plaintiff to the defendant on the ground of an alleged fraud, the answer, pleaded as a counterclaim, denied the fraud, insisted upon the validity of the deed, stated the plaintiff's continued and wrongful possession and acts of waste, and demanded judgment for the possession of the land, for the rents and profits thereof, and for damages on account of the waste. This answer was held to be a good counterclaim so far as it sought to recover the possession and the rents and profits, but not in respect to the demand for damages on account of the waste.³

¹ *Jarvis v. Peck*, 19 Wisc. 74, per Dixon C. J.: "It does not deny the plaintiff's demand, except so far as it is founded upon his possession, but seeks to extinguish it by an equitable cross-action. It is a claim which of itself would constitute a cross-action in favor of the defendant against the plaintiff in a separate suit."

² *Holzbauer v. Heine*, 87 Mo. 443, per Wagner J.: "It must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant. It must have a tendency to show an independent cause of action,—a claim existing in favor of the defendant against the plaintiff, arising either out of the contract or transaction sued on, or out of some other contract. The term is new to the law; but it is sufficiently plain and simple. When the defendant has a cause of action against the plaintiff, upon which he might have maintained a suit, such cause of action is a counterclaim. The parties, then, have cross-demands; and, in fact, there are two causes of action before the court for trial in the same suit. Both parties are to a certain extent plaintiffs, and both defendants. The answer, then, does not substantially differ from a petition; and the reply performs substantially

the same office as the answer to the petition. Each party claims affirmative relief from the other. If both parties establish their claims, the judgment is rendered for one or the other, according as his demand may be found to be in excess." See also *Hay v. Short*, 49 Mo. 139, 142, which corrects a *dictum* of Holmes J. in *Jones v. Moore*, 42 Mo. 419.

³ *Woodruff v. Garner*, 27 Ind. 4, per Frazer J.: "Was this counterclaim good on demurrer? It is not questioned that it averred facts sufficient in an independent suit to entitle the defendant to a judgment; but it is urged that these facts could not be pleaded by way of counterclaim in this suit. A counterclaim is defined to be 'any matter arising out of, or connected with, the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim for damages.' It may not be easy to define the full meaning and application of this statute; and it will therefore be safer, and less likely to produce confusion, if the court shall at present consider only the question of its influence upon the case immediately in judgment. To say, as was inadvertently done in *Slayback v. Jones*, 9 Ind. 470, that the counterclaim is the

§ 747. The foregoing citations fully sustain both the conclusions reached in the preliminary independent analysis of the statute, and the course of reasoning upon which they were based. The feature or limitation which is pointed out by some of the cases, as necessarily involved in all counterclaims belonging to the second subdivision, — namely, that the recovery therein must defeat, modify, or interfere with, the relief otherwise recoverable by the plaintiff, — results from the fact that the codes make no provisions for two independent and antagonistic judgments rendered in favor of the adverse parties in the same action. One judgment alone is contemplated by the statute, which shall determine the substantial rights of the parties. Even in equitable actions, where relief may be conferred upon defendants as against the plaintiffs or as against each other, such relief must be compatible with that granted to the plaintiff, so that the whole may be contained in one judgment without opposition or contradiction. If an action upon contract is brought to recover money alone, either debt or damages, and a counterclaim for money, arising upon an entirely distinct contract, is interposed, the resulting judgment would necessarily be single, since it would be rendered merely for the difference between the two adverse sums found due by the jury or the court. The implied restriction upon the use of counterclaims, therefore, applies only where one or both of the cross-demands are equitable. It cannot be enforced in an action to recover possession of lands or to recover possession of chattels, since in neither of these instances does the cause of action “arise out of contract,” and a counterclaim under the second subdivision is therefore impossible.

§ 748. I shall finish this inquiry into the general nature of the counterclaim by a brief statement of the mode in which it should be formally pleaded. The defendant must, in some express

same thing as recoupment, would be giving a definition obviously less comprehensive than that given by the statute above quoted. The counterclaim comprehends recoupment, and much more. It hardly admits of a question that it embraces also what was known as the cross-bill in equity against the plaintiff. Unless this be so, it would result, that, in many cases, what formerly might have been settled in one litigation, would, under the

code, require two or more separate suits to determine it. This is not the spirit of the code.” In *Eastman v. Linn*, 20 Minn. 438, which was also an action to quiet title, a similar counterclaim for the recovery of the land in question by the defendant was sustained. For an exhaustive discussion of the counterclaim as defined by the Indiana code, and for a statement of the rules in relation to its use, see *Campbell v. Routt*, 42 Ind. 410, 418-416.

and definite manner, indicate his design of treating and relying upon this particular portion of his answer as a counterclaim. Whether it stands alone, and thus constitutes the entire answer, or whether it is united with other defences or counterclaims, it must be so distinguished by the formal language employed, that the plaintiff and the court may recognize it at once as a counterclaim, and not as a simple defence. It is not enough that the defendant state facts, which, if true, would constitute a cause of action against the plaintiff: he must also state his intention to regard these facts *as* constituting the affirmative cause of action, and not to regard them as a defence. This intention must be indicated either by *naming* the matter thus pleaded "a counterclaim," — that is, by declaring that it is pleaded as such, — or by concluding it with a prayer for a judgment granting the desired relief. The better practice is — and it should be universal — to use both of these characteristics marks; to commence the particular allegations with the formal statement that they are pleaded as a counterclaim, and to end them with the usual prayer for relief as in a complaint or petition. This practical rule of pleading is fully sustained by the decided cases.¹ There is one controlling reason why the defendant should designate, in a certain and obvious manner, the special character of the pleading. In all the States but one or two, the plaintiff must *reply* to a counterclaim, or its averments of fact are admitted to be true. He ought not to be subjected to this penalty unless he is told in the most express terms that the pleading is a counterclaim. It would

¹ *Bates v. Rosekrans*, 37 N. Y. 409, 411, per Hunt J.; *McConihe v. Hollister*, 19 Wisc. 289; *Hutchings v. Moore*, 4 Metc. (Ky.) 110; *Wilder v. Boynton*, 63 Barb. 547; *McAbee v. Randall*, 41 Cal. 186. See, *contra*, *Brannaman v. Palmer*, *Stanton's Code* (Ky.), p. 90. In *Bates v. Rosekrans*, Hunt J. said: "I think the answer given by the court below is also a sound one; to wit, that the pleading does not purport to be a counterclaim. It designates itself simply as a 'further defence,' and there rests. No particular form of words is necessary to make a pleading a counterclaim; and if the party had, in any reasonable language, intimated that he intended to make a personal claim in his own favor against the plaintiff, it would have been sufficient. The ordinary

and most satisfactory form of giving that intimation is by a statement that the pleading is a counterclaim, or by a prayer for relief." In *McConihe v. Hollister*, the court said: "We are inclined to the opinion, that where an answer does not in form set up a counterclaim, but contains allegations sufficient either for a defence or for a counterclaim, it should be construed to set up a defence merely." In *Wilder v. Boynton*, the answer alleged "as a second defence" a breach by the plaintiff of the contract sued on, and ended as follows: "Whereby the defendant sustained damages to the amount of, &c.; which sum the defendant will recoup against any demand of the plaintiff." This was held to be a sufficient pleading of the matter as a counterclaim.

have been better if the courts had laid down the most explicit rule, and had required the defendant to *name* his pleading: but the cases do not go to this length; and a prayer for relief, appended to the proper allegations of fact, will supply the place of a name. It has been held, that when the defendant has set up facts which really constitute a defence, but has mistakenly called them a counterclaim, formally pleading them as such, he must stand by the designation, and cannot treat them as a defence, and have the benefit of them as a bar to the plaintiff's recovery.¹ This ruling, however, is without any cogent reason in its favor, would often work injustice, and seems opposed to some of the cases already quoted.²

II. *The Parties in their Relations with the Counterclaim.*

§ 749. 1. *The Relations of the Defendant in general with the Counterclaim: it must, in general, be a Demand in Favor of the Defendant who pleads it.* In all the States whose codès do not contain a provision in favor of sureties or joint-debtors, the rule is established without exception that the counterclaim must be a demand, existing in favor of the defendant who pleads it; in other words, the defendant cannot set up and maintain as a valid counterclaim a right of action subsisting in favor of another person, even though there may be close legal relations between himself and such other person. The sure test is very simple. Could the defendant have maintained an independent action upon the demand if he had made it the basis of a separate suit? If he could not, then he cannot use it as a counterclaim. To this proposition there is no judicial dissent nor exception; and the cases which I shall cite are intended to illustrate the various circumstances in which the rule has been applied.

§ 750. The most common case is that of a surety. When sued alone, or together with the principal debtor, he cannot interpose as a valid counterclaim any cause of action existing in favor of that principal, — not, even one arising from a breach by the plaintiff of the very contract in suit.³ There are instances in

¹ *Ferreira v. De Pew*, 4 Abb. Pr. 131 (Sp. Term), per Brady J.; *Campbell v. Routt*, 42 Ind. 410, 415. See also *McAbee v. Randall*, 41 Cal. 136, where the defendant, having named his answer a "coun-

terclaim," was not permitted to treat it as a "cross-complaint."

² See *De Leyer v. Michaels*, 5 Abb. Pr. 208.

³ *Gillespie v. Torrance*, 25 N. Y. 306.

which equity will undoubtedly relieve the surety when the principal debtor is insolvent, and holds valid claims against the plaintiff which *he* might assert: but such equitable relief would not be in the form of a counterclaim; it would be *defensive* merely, and would not include any recovery against the plaintiff by the surety. If the principal debtor and the surety are sued together, and the former interposes the counterclaim existing in his own favor and succeed on it, the result, of course, operates *as a defence* in aid of the surety: the plaintiff's demand being partly or wholly extinguished, the surety would necessarily obtain the benefit of such extinction.¹

§ 751. The rule is not confined to sureties. It requires, in general,—the only exception being the case where a separate judgment is possible—that the counterclaim should exist in favor of all the defendants, and that all the persons in whose favor it exists should be defendants in the action, and that it should be pleaded in their common behalf. Thus, where one is sued, a demand in favor of himself and a former partner not a party to the suit is inadmissible as a counterclaim;² and, conversely, in an action against partners upon a firm liability, a counterclaim interposed by one of them, alleging a demand for

308, 810, per Selden J.; s. c. 4 Bosw. 36; 7 Abb. Pr. 462; *La Farge v. Halsey*, 1 Bosw. 171; 4 Abb. Pr. 397; *People v. Brandreth*, 8 Abb. Pr. n. s. 224 (Ct. of App.), per Hunt and Porter JJ.; *East River Bank v. Rogers*, 7 Bosw. 498; *Lasher v. Williamson*, 55 N. Y. 619; *O'Brien v. Karing*, 57 N. Y. 649. *Gillespie v. Torrance* was an action against an indorser of a note. He alleged, as a counterclaim, that he indorsed for the accommodation of Van P., the maker; that the note was given for the price of timber sold by the plaintiff to Van P.; that plaintiff warranted the quality of the timber to the buyer,—a breach of this warranty, and consequent damages to Van P., for which defendant demanded judgment. This attempted counterclaim was rejected for the reasons stated in the text. The opinion of Selden J. is very elaborate and instructive. While holding that the surety has no *legal* counterclaim nor set-off, Mr. Justice Selden is of opinion that he would be relieved in equity if the principal debtor

was insolvent. This equitable relief, however, would not be in the shape of a *recovery* against the plaintiff. In *La Farge v. Halsey*, the defendants were sureties for the lessee on a lease, and were sued for rent in arrear. They set up, as a counterclaim, damages sustained by the lessee from a breach by the plaintiff of an agreement made between himself and the tenant. This was overruled, because the right of action was in the lessee alone. *East River Bank v. Rogers* was the ordinary case of a guarantor sued for the debt secured. He pleaded, as a counterclaim, a debt due from the plaintiff to his principal; and it was struck out as frivolous.

¹ *O'Brien v. Karing*, 57 N. Y. 649; *Springer v. Dwyer*, 50 N. Y. 19.

² *Campbell v. Genet*, 2 Hilton, 290. See *Bird v. McCoy*, 22 Iowa, 549,—a peculiar case, in which parties were held included as defendants in the *firm name* against which the action was brought.

damages accruing to him individually from the breach of a separate contract between himself and the plaintiff, must be rejected, because it is not in favor of all the defendants who are thus jointly sued.¹ A person sued in a representative capacity — for example, as a receiver — to recover trust-funds in his hands, or to enforce the performance of his fiduciary duty, cannot avail himself, by way of counterclaim, of a demand due to himself in his personal and private capacity;² and the converse of this particular rule is also equally true. Under any and all circumstances, a counterclaim consisting of a demand in favor of a third person not a party to the action, and having no relations with the issues involved therein, is entirely inadmissible.³

§ 752. 2. *The Relations of the Plaintiff with the Counterclaim: it must, in general, be a Demand against the Plaintiff or all the Plaintiffs in the Action.* The very conception of a counterclaim implies that it is a cause of action against the plaintiff. The test is here equally simple and plain as in the case of the defendant. Would the facts, if alleged in a separate action against the plaintiff, make out a cause of action against him, and show him liable to the appropriate relief? If not, they do not and cannot constitute a counterclaim. This rule, although universal, is most frequently applied in actions brought by assignees of the demands in suit. When the plaintiff is such an assignee, no demand accruing to the defendant against the assignor can possibly be enforced as a counterclaim. Such liability of the assignor may, under certain circumstances, be a good defence in bar of the recovery; but, as it is not a liability of the plaintiff, it cannot be a counterclaim: it is impossible, by means of a valid demand against A. alone, to obtain a judgment against B. The decisions are unanimous, and sustain the doctrine stated above under all possible circumstances.⁴ The rule is applied by the cases cited in the

¹ Peabody v. Bloomer, 5 Duer, 678; 6 Duer, 58; 3 Abb. Pr. 353, per Woodruff J.: "To an action against several joint-debtors for a debt due by them as partners, one of them cannot avail himself, either by way of set-off or counterclaim, of such a defence." See this case, and especially the opinion of Hoffman J. at Special Term on the subject of *joint liability*.

² Johnson v. Gunter, 6 Bush, 534.

³ Bates v. Rosekrans, 87 N. Y. 409,

411; Babbett v. Young, 51 Barb. 466; Ernst v. Kunkle, 5 Ohio St. 520; Dolph v. Rice, 21 Wisc. 590, 593; Briggs v. Seymour, 17 Wisc. 255; Carpenter v. Leonard, 5 Minn. 155. See, however, Moorehead v. Hyde, 88 Iowa, 382, — a case in which the defendants were held to be trustees of an express trust in a contract made with the plaintiff, and a counterclaim by them was sustained.

⁴ Boyd v. Foot, 5 Bosw. 110; Vassar v. Livingston, 18 N. Y. 248, 252, per

note to every species of assignee, private and official; and is established with absolute unanimity.

§ 753. It is an essential element in the legal notion of a counterclaim that it must be a *cause of action*; must consist of a right to some affirmative relief, and not be matter simply defensive, either in bar of the plaintiff's recovery, or in reduction of its amount. Thus, in an action for the price of work, labor, and material, the defendant in his answer set up payments made by him in excess of the plaintiff's demand, but did not in a formal manner call his pleading a counterclaim, nor demand judgment for the surplus. At the trial he insisted that his allegations were admitted because the plaintiff had not replied. His contention was overruled, not upon the defects of form, but upon the absence of any cause of action. The payments as stated to have been made being voluntary, no right to recover back the excess existed; and the answer was nothing more than the defence of payment.¹

Denio J.; s. c. 4 Duer, 285, 293, per Duer J.; Dillaye v. Niles, 4 Abb. Pr. 253; Ferreira v. De Pew, 4 Abb. Pr. 181; Thompson v. Sickles, 46 Barb. 49; McIlvaine v. Egerton, 2 Robt. 422; Wolf v. H., 13 How. Pr. 84, per E. Darwin Smith J.; Davidson v. Remington, 12 How. Pr. 310; Gleason v. Moen, 2 Duer, 639; Cummings v. Morris, 3 Bosw. 560; Wiltzie v. Northam, 3 Bosw. 162; Duncan v. Stanton, 30 Barb. 533, 536; Tyler v. Willis, 33 Barb. 327; Spencer v. Babcock, 22 Barb. 326, 335; Weeks v. Pryor, 27 Barb. 79; Van de Sande v. Hall, 13 How. Pr. 458, per Paige J.; Linn v. Rugg, 19 Minn. 181, 185; Swift v. Fletcher, 6 Minn. 550; McConihe v. Hollister, 19 Wisc. 269. In this case, the defendant prayed equitable relief that the mortgage, &c., sued on by an assignee, might be cancelled on account of the mortgagee's fraud in obtaining it. The court held that this answer was in form a counterclaim, but that it could not be relied on as such by the defendant and the relief granted, because the assignor was a necessary party; and the opinion implies, that, if he had been made a party, the relief could have been granted. Notwithstanding this array of authorities, and the explicit language of the codes, the doctrine has sometimes been overlooked by courts. Thus, in Page v. Ford, 12 Ind. 46, and Slayback v. Jones,

9 Ind. 470, the Supreme Court of Indiana entirely failed to notice that the demands existing against an assignor, which were set up by the defendants against the assignee (the plaintiff), could not possibly be counterclaims; and that the discussion of the court upon other points was therefore wholly unnecessary. In the later case of Perry v. Chester, 12 Abb. Pr. n. s. 131, Mr. Justice Monell is chargeable with the same palpable oversight. The action was on an appeal bond given by two defendants to A., and by him assigned to the plaintiff. One of the defendants set up a demand in his own favor alone against A., the assignor, as a counterclaim. The learned judge discusses at great length the question, whether one defendant in such an action can rely upon a claim due to himself alone; and finally reaches the conclusion, that, as the undertaking of the defendants was *joint*, the demand of the single defendant is not available. He is wholly oblivious to the fact that no such claim could be interposed at all in the action against the plaintiff.

¹ Holzbauer v. Heine, 37 Mo. 443; and see McPherson v. Meek, 30 Mo. 345; Lash v. McCormick, 17 Minn. 408 (partial failure of consideration); Kent v. Cantrall, 44 Ind. 452, 459; McCrary v. Deming, 38 Iowa, 527, 531; Lathrop v. Godfrey, 6 N. Y. S. C. 96, — a peculiar case, in which

And payments or disbursements made by a trustee or holder of a fund, and set up by him in his answer to an action for an account and enforcement of the trust brought by a beneficiary, do not create any right of action, and cannot, therefore, be a counterclaim.¹

§ 754. In actions by married women to recover demands due to them personally as a part of their separate property, or their personal earnings, and the like, debts and liabilities of their husbands cannot be successfully interposed as counterclaims;² and, in a suit by a widow to recover dower in land conveyed by her husband during the marriage without her release, the defendant cannot counterclaim damages arising from the breach of a covenant of warranty in the husband's deed; for no right of action exists against her.³ The demand must also be against the plaintiff in the same capacity as that in which he sues. Thus, where the action is by the plaintiff in his private and personal capacity, a claim against him as an executor or an administrator cannot be made a valid counterclaim.⁴ But, in an action by an executor on a note given to the testator, the defendant can set up by way of counterclaim a demand for damages caused by the fraud of the deceased in the sale of land for the price of which the note was given.⁵ Not only must the counterclaim be a right of action against the plaintiff, but it must, in general, be against the plaintiff alone, and against all the plaintiffs.⁶ The exception to this

a demand against the plaintiff's assignor, who, it was alleged, was the real party in interest, was sustained; citing *Hunt v. Chapman*, 51 N. Y. 555; *First Nat. Bank v. Kidd*, 20 Minn. 234, 242, — an action to foreclose a mortgage, in which defendant claimed that the debt should be enforced upon other lands before proceeding against those in suit.

¹ *Duffy v. Duncan*, 85 N. Y. 187, 189. It has been held that no counterclaim is possible against the State beyond the defeating the action brought by it, because a judicial proceeding cannot be maintained against it: the counterclaim can be used as a defence, but no further. *Commonwealth v. Todd*, 9 Bush, 708.

² *Paine v. Hunt*, 40 Barb. 75.

³ *Hill v. Golden*, 18 B. Mon. 551, 554.

⁴ *Merritt v. Seaman*, 6 Barb. 330. The plaintiff sued on a note given to him as executor after the death of the testator,

and the counterclaim was a debt due from the testator. In support of its decision, that these demands did not affect the plaintiff in the same capacity, the court cited *Fry v. Evans*, 8 Wend. 530; *Mercein v. Smith*, 2 Hill, 210; but see *Westfall v. Dungan*, 14 Ohio St. 276. When a receiver, trustee, executor, or administrator, sues to recover a debt due to the estate, a demand by the defendant for services rendered on behalf of the estate on the plaintiff's employment is a good counterclaim. *Davis v. Stover*, 58 N. Y. 473.

⁵ *Isham v. Davidson*, 52 N. Y. 237. See *McLean v. Leach*, 68 N. C. 95; *Brandon v. Allison*, 66 N. C. 532, for the peculiar rules prevailing in North Carolina.

⁶ *Mynderse v. Snook*, 1 Lans. 483. The opinion of T. A. Johnson J. contains an elaborate discussion of the general subject of joint and separate demands and

rule is expressly provided for by the codes, and only exists in those cases where a separate judgment may be rendered for or against the person against whom the counterclaim is pleaded. This exceptional case will be examined in the following subdivision.

§ 755. 3. *When the Counterclaim may be in Favor of one or more of several Defendants, and against one or more of several Plaintiffs.* The provision found in nearly all the codes, that the counterclaim must exist "in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action," implies that whenever the single defendant or all the defendants jointly may recover against one or some of the plaintiffs and not against all, or whenever one or some of the defendants and not all may recover against the single plaintiff or all the plaintiffs jointly, or whenever both of these possibilities are combined, a counterclaim may be interposed against the one or some of the plaintiffs and not against all, and by the one or some of the defendants and not by all. Such a severance in the recovery is possible when the right sought to be maintained on the one side, and the liability to be enforced on the other, are not originally joint. The discussion is therefore reduced to the question, When

judgments. See also *S. P. Belknap v. McIntyre*, 2 Abb. Pr. 866; *McPherson v. Meek*, 80 Mo. 845; *Merrick v. Gordon*, 20 N. Y. 93, 97; *N. Y. Ice Co. v. Parker*, 8 Bosw. 688. It may be interesting and instructive to contrast this rule as it has been inferred from the language found in the codes generally with the very different rule that results from the freer provisions of the Iowa statute. In an action brought by a single plaintiff to recover damages for the non-performance of a contract to sell and deliver cattle, the defendants alleged the following facts as a counterclaim, and proved the same at the trial: that, subsequently to the agreement sued upon, they entered into a second and different contract with the plaintiff and certain other persons composing a partnership, under the firm name of Gadsden & Co., by which they agreed to deliver, and the firm to receive, the same cattle at the same time and place, but at an enhanced price; that this second contract was substituted instead of the former one; that they had fully tendered per-

formance, but the purchasers had wholly refused to accept and pay for the cattle, to their damage, for which they demanded judgment against the plaintiff, *Gadsden & Co.*, of course, not being parties to the suit. This counterclaim was sustained, the court saying: "The defendants could hold him [the plaintiff] liable in this action for the damages sustained for not receiving the cattle; that is to say, though others may have been jointly liable with him [the plaintiff], the defendants could recover their damages in this action against him. The defendants could have sued the plaintiff on this contract; and, if so, they could set up their counterclaim, and hold him for his refusal to receive. And within the rule recognized by this court in *Ryerson v. Hendrie*, 22 Iowa, 480, this would be so, though the contract was made with the new parties as a partnership." *Redman v. Malvin*, 23 Iowa, 296, 299. See also *Musselman v. Gallagher*, 32 Iowa, 883; *Baird v. Morford*, 29 Iowa, 581, 584.

may a severance in the judgment be had, so that it may be rendered for a part of the plaintiffs and against the others, and against a part of the defendants and for the others? From the answer to this inquiry we shall ascertain between what parties "a several judgment may be had in the action;" and as a further consequence, when the counterclaim may be against one or more of the plaintiffs, or in favor of one or more of the defendants. In pursuing the discussion, I shall collect and examine some of the leading judicial decisions which have given a construction to the clause, and shall endeavor to ascertain from them the general principles and rules that may determine, in each particular case, when a counterclaim of this form and nature is proper.

§ 756. (1.) *Against one or some of the Plaintiffs.* An action for an accounting and a recovery of the amounts found due was brought by three plaintiffs against two defendants under the following circumstances: The five parties had entered into an agreement for the publication of a newspaper: the defendants were to be the actual publishers, and to have charge of the business; and, after paying all the expenses, the net proceeds were to be divided into five equal parts, of which the defendants were to retain two, and one of the other "three parts shall be paid by [defendants] in cash to each of the other parties to this agreement," — the plaintiffs. The answer, besides other separate defences, contained a counterclaim consisting of a judgment recovered by the defendant R. against the plaintiff H., and assigned to both the defendants before the suit was commenced. This counterclaim was set up against the plaintiff H. alone. The New York Court of Appeals held, that although the action was *in form* joint, yet the right of each plaintiff was several; and a several judgment, declaring the sum to which each was entitled, was necessary.¹ Nothing can be more firmly settled than the

¹ Taylor v. Root, 4 Keyes, 385: "Hence, as to either of the plaintiffs, if the defendants had averred and proved payment in full of his share, the defence as to such plaintiff would have been effectual; and yet the other two plaintiffs would have been entitled to judgment for the several amounts of their shares. . . . The same principle is applicable to a defence in the nature of a counterclaim. . . . The plaintiff's posi-

tion is undoubtedly correct, that where the cause of action is strictly joint, and the recovery, if had, is for the joint benefit of the plaintiffs, the defendant cannot set off or counterclaim the individual debt of either plaintiff to defeat or reduce a joint recovery." Such, however, was not the present case, because there was no joint demand on the part of the plaintiffs. The counterclaim was, therefore, sustained.

general rule, that in the absence of a statutory provision to the contrary, where an action is brought by a partnership on a claim due the firm, no demand in favor of the defendant against one or some of its members can be used as a counterclaim; but an apparent exception to this rule has been admitted. If the business had been carried on by one or more of the firm as *ostensible* partners, a debt owing by him or them may be interposed as a counterclaim, although all the members have united in the action. By their mode of conducting the business, the ostensible partner or partners had been held out to the world as the real firm, and they could sue or be sued without joining the others as parties to the proceeding.¹ The case of a demand against the plaintiff or plaintiffs on the record, and others who are not parties to the suit, being pleaded as a counterclaim, has already been considered. It does not present *exactly* the question now under consideration, but depends for its solution upon the same general principles. It is settled by the decisions, that a joint indebtedness or liability due from the plaintiff and from others not parties to the suit cannot be used as a counterclaim against the plaintiff, because such a cause of action cannot be severed and a judgment rendered against a part only of the persons liable.²

§ 757. Upon the general question, When can a several judgment be rendered between some of the parties to an action? there has been much conflict of judicial opinion, and discrepancy of decision. It resolves itself into the broader inquiry, How far has the common-law doctrine of joint rights and liabilities been changed by the new procedure? The judges of one school have denied *any* modification in these *legal* notions, and have restricted the language of the statute to equitable proceedings. Another school have gone to the opposite extreme, and have

¹ Van Valen v. Russell, 18 Barb. 590, 592, per Edwards J.; citing 1 T. R. 361 (n.); *Ex parte* Enderby, 2 B. & C. 389; Smith v. Watson, 2 B. & C. 401.

² See *supra*, § 764; Schubart v. Harteau, 34 Barb. 447; Belknap v. McIntyre, 2 Abb. Pr. 366; Mynderse v. Snook, 1 Lans. 488; *contra* in Iowa, Redman v. Malvin, 23 Iowa, 296; and in North Carolina, Sloan v. McDowell, 71 N. C. 356-358; Neal v. Lea, 64 N. C. 678; Harris v. Burwell, 65 N. C. 584. This ruling is not based upon any peculiar

statute, but upon the general provision of the code, § 248, that a "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants;" which is the same as found in all the other codes. Where, in Kentucky, an action was commenced against a resident of the State by a non-resident firm, a demand against one of the plaintiffs was allowed as an equitable set-off or counterclaim, because the defendant could not sue upon it in that State, Wallenstein v. Selizman, 7 Bush, 175.

declared the ancient rules as to joint right and liability to be utterly abolished, so that a severance among the plaintiffs or defendants in the recovery may be had in all cases.¹ This loose or liberal interpretation has, however, been utterly repudiated by other cases, which, as it seems to me, establish, by a very decided preponderance of judicial authority, the doctrine as now generally accepted in those States whose codes compose the two groups mentioned at the commencement of the section.² The

¹ See *Cowles v. Cowles*, 9 How. Pr. 361. The action was brought by two plaintiffs upon a promissory note, made payable to them on demand. The defendant alleged facts tending to show that the note was the sole property of the plaintiff, C., and stated a demand in his own favor against C., in every respect proper and sufficient to constitute a counterclaim, if the latter had been the only plaintiff. This answer having been struck out on motion, the General Term, upon appeal, pronounced it a valid counterclaim, and available to the defendant as pleaded. Two questions, it was said, are raised. "First, in an action upon contract by two or more plaintiffs, can one of them have judgment in his favor, the evidence establishing the cause of action in him alone? Secondly, if so, can the defendant, upon showing the cause of action to be solely in the one plaintiff, avail himself of a set-off against that plaintiff in a case where he would have had the right to do so had the action been commenced by that plaintiff alone?" Both of these questions were answered in the affirmative. It was said that the new procedure extended the rules of equity to all legal actions, and so far abrogated the legal notions of joint right and liability; that the sections permitting a judgment "to be given for or against one or more of several plaintiffs, and for or against one or more of several defendants," are most general in their terms, and should not be restricted to actions in which the right sued upon is several, and not joint; and that, a several judgment being thus made possible, the conclusion as to the propriety of the counterclaim against one plaintiff followed inevitably from the express language of the statute. In other words, no matter what be the form of the action, although the plaintiffs have alleged

a joint right in themselves, the defendant may controvert this allegation, show a several right in one of them alone, and interpose a counterclaim against that one. This decision, it will be noticed, does not go to the length of holding, that, when two or more plaintiffs sue upon a legal right which is confessedly joint, the defendant, while admitting this joint cause of action, and the union of all the plaintiffs therein, may assert a counterclaim against one, or some of them less than all. The reasoning of the learned judge seems logically to lead to that result; for it argues that a several judgment is possible in all cases upon contract; and, if possible, the counterclaim is expressly permitted. See also the *dictum* of Folger J. in *Simar v. Canaday*, 53 N. Y. 296, 301. The same construction is given to the provision in North Carolina, *Sloan v. McDowell*, 71 N. C. 356, 357; *Neal v. Lea*, 64 N. C. 678; *Harris v. Burwell*, 65 N. C. 584.

² A few cases will illustrate this prevailing doctrine. In *Mynderse v. Snook*, 1 Lans. 488, 491-493, the court discusses the general doctrine of joint and several liabilities and judgments; and from its able opinion I make the following extracts: "The demand which the defendants had was against the plaintiff and V. jointly as partners and joint contractors with them. It was for damages arising from an alleged breach of the contract by these two partners. This claim, as is apparent, was not against the plaintiff, but against the firm of which he was an individual member. Properly there could be no several judgment between the parties to this action on account of that claim. It was not upon its face or in law a claim against the plaintiff individually. This is the test (code, § 150). It was a partnership debt if a demand existed. Partners

doctrine established by these decisions is, that if the demand in suit was originally joint and several, although the action upon it is joint, and *a fortiori* if it was several, a several judgment *might* have been recovered, and the counterclaim against part of the plaintiffs, or in favor of a part of the defendants, is possible: when the demand in suit is originally joint, a severance is impossible.

§ 758. (2.) *In Favor of one or some of the Defendants.* In the following cases the counterclaim was interposed by one or some of the defendants against the single plaintiff, or all the plaintiffs if more than one. The same general principles of joint and several right and liability control this class of actions and the one just considered, and the same decisions are authorities in both.¹ The rule is settled, that, in an action against defendants

are not joint and several debtors, but joint debtors only. Nothing is better settled than the general rule, that a creditor of a partnership is not entitled, as matter of law, to bring a separate action, and have a separate judgment, against one of the several partners when they are all living." The court then examined and criticised certain cases relied upon by the defendants. The language of Ingraham J. in *Schubart v. Harteau*, 34 Barb. 447, was declared to be a mere *dictum*, and its correctness as such was pointedly denied. *Briggs v. Briggs*, 20 Barb. 477, and *Parsons v. Nash*, 8 How. Pr. 454, were distinguished from the case at bar. The point of distinction in both was the fact that the liability of the defendants therein was several as well as joint; so that a several judgment against each of them would have been possible. "The grounds of these decisions," the court continues, "were undoubtedly correct if the demand on which the action was brought was several as well as joint, so that the plaintiff might have had a several judgment in the action against either defendant. It fulfilled, in that view of it, precisely the requirements of the code. Neither of these cases supports the *dictum* in *Schubart v. Harteau*. According to the rule there laid down, the right to interpose and prove a demand by way of counterclaim depends upon the manner and form of the pleadings in the action, rather than upon

the general principles of the law. This, I am sure, is not the true meaning of § 150 of the code. By that section, the demand must be of such a nature and character, that, upon the general rules and principles of law, a several judgment may be had upon it in the action. If it is not such, the party offering it is not entitled to use it in that way."

¹ *Peabody v. Bloomer*, 5 Duer, 678, 679, per Woodruff J.; *s. c. sub nom.* *Peabody v. Beach*, 6 Duer, 58; 3 Abb. Pr. 353. The same construction was given to the statute by Mr. Justice Marvin, and applied to the admissibility of a counterclaim, in *Parsons v. Nash*, 8 How. Pr. 454; and as his reasoning has been frequently approved, and his conclusions adopted by other courts, I shall quote his opinion, not as a binding authority, — for it was delivered at Special Term, — but as an argument. The three makers of a joint and several note, H., N., and P., were sued in a joint action, H. being the principal debtor, and the others his sureties. The answer was a counterclaim of a judgment in favor of H. alone against the plaintiffs for an amount greater than the sum secured by the note. It was admitted on the trial; and the plaintiffs moved to set aside the verdict. After referring to § 150, the judge proceeds: "The counterclaim is to be a claim existing in favor of a defendant and against a plaintiff between whom a several judg-

who are *joint* contractors and jointly liable, a separate judgment against one or more less than all is not possible except in a few special personal defences; that in an action, though joint in form, against defendants who are *joint and several* contractors, and *a fortiori* against defendants who are severally liable, such a separate recovery may always be had. The doctrine thus stated has been applied to the case of defendants sued upon a bond in terms joint and several.¹

§ 759. A peculiar question has arisen in those States whose codes permit a partnership to be sued by its firm name. In such an action, a counterclaim in favor of *all* the persons actually composing the firm may be pleaded and proved, although it discloses the existence of partners who had not been mentioned as such in the petition or complaint.² In an action upon an injunction bond executed by the plaintiff in an equity suit and sureties, the principal defendant was permitted by the Kentucky Court of Appeals to counterclaim damages sustained by himself individually from the wrongful acts of the plaintiff committed while the injunction was in force.³ As one of two or more joint debtors cannot rely upon a demand due to him separately, upon the same principle a defendant cannot interpose a counterclaim in favor of himself and another, or others jointly who are not parties to the suit.⁴ Bonds having been issued in the name of a town in aid of a railroad under color of statutory proceedings, the town brought an equitable suit against all the holders thereof to have the

ment might be had in the action. This clearly indicates that there may be cases where the set-off or counterclaim may not be due to or in favor of all the defendants; and to ascertain between whom a several judgment may be had in the action, we must look to other provisions of the code, particularly §§ 136 and 274. In my opinion, in an action proper for a set-off or counterclaim against several defendants *severally* liable, or *jointly and severally* liable, any one of them may avail himself of his set-off or counterclaim; or any number of the defendants to whom the set-off or counterclaim is jointly due may avail themselves thereof."

¹ *People v. Cram*, 8 How. Pr. 151. The opinion in this case has been frequently cited with approval, and has never been questioned. See also, to the

same effect, *Briggs v. Briggs*, 20 Barb. 477, 479; *Gordon v. Swift*, 46 Ind. 208, 209; *Johnson v. Kent*, 9 Ind. 252; *Blankenship v. Rogers*, 10 Ind. 333; *Knour v. Dick*, 14 Ind. 20; *Uitley v. Foy*, 70 N. C. 303; *Newell v. Salmons*, 22 Barb. 647; *Perry v. Chester*, 12 Abb. Pr. n. s. 131, 133. If, however, the defendants are *joint* debtors, no such counterclaim is admissible, *Pinckney v. Keyler*, 4 E. D. Smith, 469; *Slayback v. Jones*, 9 Ind. 470.

² *Bird v. McCoy*, 22 Iowa, 549.

³ *Tinsley v. Tinsley*, 15 B. Mon. 454. Although the particular question under discussion was not alluded to by the court, its very silence must be taken as an admission that such a counterclaim in favor of one defendant was proper.

⁴ *Stearns v. Martin*, 4 Cal. 227, 229.

proceedings declared void, and the bonds themselves cancelled. One of the defendants individually set up as a counterclaim a debt to himself from the town for money loaned. This answer was overruled on the merits, the court holding that it did not fall within the definition of any species of counterclaim. The omission to rest the decision upon the obvious ground, if it existed, that a counterclaim in favor of one defendant was improper, was a plain though silent admission that this objection was untenable. In such an action a separate judgment is not only possible, but is, in fact, absolutely necessary.¹

§ 760. As the Iowa code is unlike that of any other State in this respect, I quote somewhat freely from a very recent case, which gives a construction to its language, and explains its peculiar provisions. In an action against a husband and wife jointly, three counterclaims or cross-demands were pleaded as follows: (1) By both defendants jointly to recover damages caused by the plaintiff's malicious prosecution of the wife; (2) by the husband alone to recover damages caused by the malicious prosecution of his minor children; (3) by the husband alone to recover damages caused by the malicious prosecution of himself. The judgment of the court, giving a construction to the statute, and passing upon the validity of this counterclaim will be found in the footnote.²

¹ *Town of Venice v. Breed*, 65 Barb. 597, 606, 606.

² *Muselman v. Galligher*, 32 Iowa, 383, 389. There are, *first*, "set-off," which is an independent cause of action arising on contract or ascertained by the decision of the court, and can be pleaded only in an action on contract; *secondly*, "counterclaim," which is a cause of action in favor of the defendants, or *some of them*, against the plaintiffs, or *some of them*, arising out of the contract or transaction set forth in the plaintiff's petition as the foundation of his claim, or connected with the subject of the action; *thirdly*, "cross-demand," which is a statement of any new matter constituting any cause of action in favor of the defendant, or *all* the defendants, if more than one, against the plaintiff, or *all* the plaintiffs, if more than one, and which the defendant or defendants might have brought when the suit was commenced, or which was then held, whether matured

or not, if matured when pleaded. "The 'cross-demand' is more comprehensive than either the set-off or the counterclaim. A set-off is only pleadable in an action on a contract, and must itself arise on contract. A counterclaim must arise out of the cause of action, or be connected therewith. A 'cross-demand,' however, arises upon any independent cause of action, whether on contract or tort. But a 'cross-demand,' unlike a counterclaim, must exist in favor of *all* the defendants, if there are more than one, and against *all* the plaintiffs, if there are more than one. This is the plain reading of the statute; so that, when there are several defendants, a 'cross-demand' in favor of one only cannot be pleaded." Applying these principles, the answer in question was held to be wholly bad. The demands were certainly not set-offs, since they arose out of torts: they were not counterclaims, because they did not arise out of, nor were they

§ 761. By the decisions which have been reviewed in the foregoing paragraphs, certain specific rules are clearly established for all the States whose codes may be classed in either of the two general groups mentioned at the commencement of this section. *First*, when the defendants in an action are *joint* contractors, and are sued as such, no counterclaim can be made available which consists of a demand in favor of one or some of them. *Secondly*, when the defendants in an action are *jointly and severally* liable, although sued jointly, a counterclaim, consisting of a demand in favor of one or some of them, may, if otherwise without objection, be interposed. *Thirdly*, since it is possible, pursuant to express provisions of all the codes, for persons *severally* liable to be sued jointly under certain circumstances in a legal action, — that is, in an action brought to recover a common money judgment, — a counterclaim in favor of one or more of such defendants may be pleaded and proved. *Fourthly*, in all equitable suits wherein persons having different interests, and against whom different reliefs are demanded, may be, and constantly are, united as codefendants, a counterclaim existing in favor of one or more of such defendants may be interposed, free from any objection based entirely upon the situation of the parties. *Fifthly*, when two or more persons have a *joint* right of action, and unite as plaintiffs to enforce the same, a counterclaim cannot be admitted against one or some of them in favor of any or all the defendants. *Sixthly*, when two or more persons have separate rights of action, and they are properly united as plaintiffs in one action to enforce these rights, a counterclaim may be set up against one or more of them, as the case may be. *Seventhly*, if two or more plaintiffs should bring an action joint in form, and should allege and claim to recover upon a joint cause of action, — even a contract, — but in fact the joinder was improper because as to some, or perhaps all but one, there existed no right of action, a recovery could be had in favor of the one or more who established a cause of action, and the complaint be dismissed as to the others ; and it would seem to follow as a necessary corollary

connected with, the plaintiff's cause of action. If it is said they were "cross-demands," they were inadmissible, because they were in favor of one defendant alone. The claim of damages for the tort to the wife was declared to be one in her

own favor, if it existed at all ; and the husband could not join with her in enforcing it, whether she brought an action on it as a plaintiff, or pleaded it as a "cross-demand" in an action against her.

that a counterclaim might be interposed against the one or more of the plaintiffs under such circumstances in whose favor a separate judgment could be rendered. *Lastly*, in equitable actions, counterclaims in favor of one or some of the defendants, and against one or some of the plaintiffs, must be permissible as a general rule, since in equity the common-law doctrine of joint right and liability does not generally prevail, and separate judgments, or judgments conferring separate relief, among the parties, are almost a matter of course.

§ 762. Counterclaims otherwise proper may be inadmissible or ineffectual for the want of the necessary parties before the court, since the same rules as to parties must apply to them as would be applied if the facts alleged and the relief demanded were stated in a complaint or petition as the basis of a separate action. This objection will more frequently present itself in counterclaims that are equitable in their nature. As the relief *must* be denied to the plaintiff in an equitable action unless he has brought all the *necessary* parties before the court, and *may* be denied unless he has brought in all the *proper* parties, and as the defendant pleading a counterclaim is in the same condition as an ordinary plaintiff, while the plaintiff against whom it is pleaded is in the position of an ordinary defendant, it follows, *first*, that the relief demanded by the counterclaim *must* be refused if all the necessary parties are not present; and, *secondly*, that it *may* be refused if any proper parties have been omitted. These propositions require no argument or citation in their support. They result inevitably from the fact that the counterclaim is in its nature a cross-action, governed by the same rules which control a suit when proceeding in the ordinary and direct manner. Several examples of legal actions in which the counterclaim has failed for want of the necessary parties have already been quoted; namely, those decisions in which counterclaims against the plaintiff in the action, and others jointly liable with him, or in favor of the defendant and others jointly interested with him, have been overruled.¹ A single additional authority will suffice to illustrate a principle which really needs no illustration. In an action to foreclose a mortgage, brought by an assignee thereof, the mortgagee not being a party to the record, the defendants alleged, as an equitable counterclaim, facts tending to show that

¹ See *supra*, §§ 754 et seq.

the mortgage and the note secured by it were procured to be executed by the mortgagee's fraud, and that the plaintiff took with notice of the fraud, and prayed that the note and mortgage might be cancelled, and the plaintiff enjoined from enforcing them. The court said: "It is evident, that, if the allegations of this answer were in the form of a complaint in a separate action asking that the note and mortgage be surrendered and cancelled, the railroad [the mortgagee] would be a necessary party defendant. The defendant then could not set up the facts alleged in his answer as a counterclaim in this action, for the reason that a new party must be brought before the court."¹ In a few States this difficulty is very properly met and obviated by express provisions of their codes, which authorize the addition of new parties in order that the relief demanded by the counterclaim or set-off may be granted.²

III. *The Subject-Matter of Counterclaims, or the Nature of the Causes of Action which may be pleaded as Counterclaims.*

§ 763. This general subdivision is naturally separated into three heads, which I shall proceed to examine in the order stated.

A. Nature of the subject-matter generally, with special reference to the question whether the counterclaim may be an equitable cause of action and may result in the granting of equitable relief, or whether it must be restricted to legal causes of action and reliefs. B. The particular questions which arise under the first clause or branch of the statutory definition. C. Those which arise under the second clause or branch of the same provision.

A. *Whether a Counterclaim may be an Equitable Cause of Action, and the Means of obtaining Equitable Relief; or whether it must be restricted to Legal Causes of Action and Reliefs.*

§ 764. From the decisions cited in the foot-note, the following doctrines and rules are clearly and firmly established. In an

¹ *McConihe v. Hollister*, 19 Wisc. 269. See also *Coursen v. Hamlin*, 2 Duer, 513; *Cummings v. Morris*, 25 N. Y. 625; but see *Du Pont v. Davis*, 35 Wisc. 681, 640, 641, which holds that an equitable counterclaim of reformation, and the like, may be sustained, and the relief granted, without the presence of parties collaterally interested;

as, for example, the grantor in the deed to be reformed. The case of *Hicks v. Sheppard*, 4 Lans. 335, which holds the contrary, was expressly disapproved.

² Ohio, §§ 96, 98; Kans. §§ 97, 99; Neb. §§ 103, 105; Ind. § 63; Iowa, § 2662. See these sections quoted at large, *supra*, § 584, note.

equitable action, a counterclaim consisting of an equitable cause of action, and demanding equitable relief, may be interposed if it possesses all the other elements required by the definition, and may, in many if not most cases, be pleaded by one or more of the defendants less than all, against one or more of the plaintiffs. The language of the statute does not confine the use of this affirmative species of defence to legal actions, nor require that it should necessarily be of a legal nature itself. Adapting itself to the character of the action in which it is introduced, in those which are legal it resembles, although much broader and more comprehensive, the former set-off and recoupment, while in those which are equitable it often takes the place of a cross-bill or complaint. In a *legal* action, also, an equitable counterclaim may be set up and affirmative relief may be granted by its means. As the codes in express terms permit equitable defences in such actions, and as in the self-same provision, and by means of the same language, the statute authorizes the joining of as many defences and counterclaims, *whether legal or equitable, or both*, as the defendant may have, to deny the possibility of an equitable counterclaim in a legal action, would make it necessary, if any consistency were preserved, to deny also the possibility of an equitable defence. The courts, as may be seen from the citations made below, have, with a few unimportant exceptions, been unwilling to nullify the language, and defeat the design of the legislature in this manner, and following its plain meaning and import, they have freely admitted and sustained the equitable counterclaim in all actions, whether legal or equitable, where that form of relief was appropriate, and was authorized by the descriptive terms of the statute.¹

§ 765. Whether all affirmative equitable relief granted to a defendant must be limited to the cases in which a counterclaim is possible, that is, whether a defendant is unable to set up a case for equitable affirmative relief, and obtain a judgment therefor in

¹ *Hicksville, &c. R. R. v. Long Island Spalding v. Alexander*, 6 Bush, 160; *R. R.*, 48 Barb. 355, 360; *Fisher v. Moolick*, 13 Wisc. 321; *Sample v. Rowe*, 24 Ind. 208; *Lombard v. Cowham*, 34 Wisc. 486, 491, 492, and cases cited, which show that in Wisconsin every equitable defence must be a counterclaim; *Vail v. Jones*, 31 Ind. 467; *Charlton v. Tardy*, 28 Ind. 452; *Du Pont v. Davis*, 35 Wisc. 681, 689-641; *Jarvis v. Peck*, 19 Wisc. 74; *Grimes v. Duzan*, 32 Ind. 361; *Woodruff v. Garner*, 27 Ind. 4; *Eastman v. Linn*, 20 Minn. 488; *Andrews v. Gillespie*, 47 N. Y. 487, 490; *Cavalli v. Allen*, 57 N. Y. 508, 514. See, *per contra*, that the counterclaim must always be a legal cause of action, *Jones v. Moore*, 42 Mo. 413, 419.

his favor against the plaintiff, unless he can bring the facts constituting his cause of action within some one of the species of counterclaim defined by the codes, is another question. There are decisions which answer this question in the affirmative, and hold that all such relief must be denied unless the defendant's cause of action is a proper counterclaim. This doctrine was recently maintained by the Supreme Court of New York. An action was brought to restrain the defendant from using a trade-mark alleged to be the sole property of the plaintiff. The answer asserted that the trade-mark in question belonged in fact exclusively to the defendant, that the plaintiff had no right to it, but was unlawfully and wrongfully using it, and thereby interfering with and injuring the defendant's business, and concluded by praying for an injunction, an account, and judgment for damages. At the trial, the defendant's allegations were fully sustained by the proofs, and he obtained the judgment demanded. This judgment was reversed on appeal, the court saying: "To entitle the defendant to affirmative relief, the answer must set up a counterclaim.¹ The claim of defendant for relief is not a counterclaim within the meaning of that term as used in the code. It does not arise out of the transaction set forth in the plaintiff's complaint, nor does it arise on contract."² The general subject of the affirmative equitable relief which may be obtained by a defendant has been already discussed, and the discussion need not be repeated. Undoubtedly, in the great majority of instances, any equitable affirmative relief properly conferred upon a defendant would fall within some description of a counterclaim; in order that it should not be a counterclaim, it must be a cause of action entirely independent of that set forth by the plaintiff, and not arising from a contract. Under the equity practice and system of pleading which prevailed prior to the codes, the matters which could be set up by a defendant in a cross-bill, as the foundation for affirmative relief to him, must have some connection with the matters originally charged against him by the plaintiff's bill, even if his demand did not directly arise out of such original matters; an entirely distinct and independent cause of action could not be alleged by the defendant in a cross-bill; if he had such a claim, he could only enforce it by a

¹ Wright v. Delafield, 25 N. Y. 266; Garvey v. Jarvis, 54 Barb. 179.

² Glen & Hall Man. Co. v. Hall, 6 Lans. 158, 161, 162.

separate suit.¹ The codes do not seem to have, in any express manner, enlarged the scope and operation of the defendant's equitable affirmative relief otherwise than by the provisions relating to the counterclaim. In actions of a legal nature it is very clear that no affirmative relief can be obtained by a defendant, unless his cause of action or demand is a proper counterclaim.

§ 766. I shall close this branch of the subject by mentioning some special instances, or actions of a particular character, in which it has been held that a counterclaim is not possible, or that the affirmative relief demanded by the defendant could not be the subject of a counterclaim. In an action for a limited divorce on the ground of cruelty, the defendant's answer, charging adultery by the plaintiff and demanding an absolute divorce, is not a proper counterclaim; ² nor, in an action for an absolute divorce because of adultery, is an answer alleging cruelty and praying for a judicial separation.³ In some States a mechanic's lien is enforced, not by any special proceedings, but by an ordinary equitable suit. An answer in an action for such a purpose, alleging that the premises described in the complaint formed the defendant's "homestead," and were, therefore, pursuant to statute, free from all lien or charges in favor of creditors, was held not to be a counterclaim, since it stated no cause of action against the plaintiff, and was, in fact, tantamount to a denial.⁴

§ 767. It would seem that, in an action to recover the possession of specific chattels, no counterclaim is possible, unless, perhaps, equitable relief may be awarded under some very exceptional circumstances. A judgment for a return to the defendant of the chattels in controversy is not a counterclaim, for it is expressly provided for by the codes, the very issue in the action being, Which party is entitled to the possession? and the court by its judgment awarding the possession, or the value in money if possession cannot be given, to the one who establishes the right; if, therefore, the plaintiff had taken the goods into his own cus-

¹ Daniell's Chan. Pl. and Prac. 1647; see *Armstrong v. Armstrong*, 27 Ind. 186; *Story's Eq. Pl.* §§ 889, 897. *McNamara v. McNamara*, 9 Abb. Pr. 18,

² *Henry v. Henry*, 8 Robt. 614; 17 Abb. Pr. 411. in which such relief was granted to the defendants.

³ *Diddell v. Diddell*, 8 Abb. Pr. 167; *Englebrecht v. Rickert*, 14 Minn. 140.

Griffin v. Griffin, 23 How. Pr. 183; *Terhune v. Terhune*, 40 How. Pr. 258; but

today by the authorized preliminary proceedings, they or their value must be restored when the action fails.¹ If a counterclaim can be interposed in this suit, it must be either (1) a demand for money, or (2) a demand for the possession of certain other and different chattels, or (3) a demand for some kind of equitable relief. A counterclaim for money could not be admitted under the principle established by the cases that the relief must have *some* connection with that asked for by the plaintiff, and must tend to diminish or modify it in some manner. A judgment for money obtained by the defendant could not interfere with or be *counter* to a judgment awarding possession of chattels to the plaintiff.² The same difficulties attend the second alternative. It seems impossible that when the plaintiff seeks to recover possession of certain specific chattels, the defendant's right to the possession of other and distinct articles could arise out of the same transaction which is the foundation of the plaintiff's claim, or could be connected with the subject of the plaintiff's action. The "transactions," which are the foundations of their respective causes of action, must, from the very nature of the case, be different. It is not pretended that the action, or the cross-demand, is based upon contract. And, finally, the relief granted to the defendant would be entirely independent of that conferred upon the plaintiff; the two would be complete and entire each by itself, and thus there would be in effect two judgments, not modifying or interfering with each other, and not relating to the same subject-matter. This reasoning, and the conclusion reached by it, have been sustained by judicial decision, and thus seem to be supported alike by principle and by authority.³ It is possible, perhaps, though hardly probable, that equitable relief may, under

¹ See *DeLeyer v. Michaels*, 5 Abb. Pr. 203, in which this doctrine was affirmed, although it plainly needs no authority in its support.

² See *Moffat v. Van Doren*, 4 Bosw. 609. It is possible, perhaps, that the plaintiff's right to the possession might depend upon the defendant's failure to pay a stipulated sum of money, as in the case of a conditional sale and delivery, when the property was to remain in the vendor until the price was paid, although possession had been transferred to the vendee. In an action brought to recover the chattels under such circumstances, the

defendant might, perhaps, set up as a counterclaim an independent demand due to himself from the plaintiff on contract, and thus diminish or extinguish the unpaid balance of the purchase price. Such a counterclaim would be analogous to the similar one in a suit by a vendor of land against the vendee, which was sustained in *Cavalli v. Allen*, 57 N. Y. 508.

³ *Lovensohn v. Ward*, 45 Cal. 8. This case expressly holds that a claim to recover the possession of distinct and separate chattels cannot be set up as a counterclaim.

certain exceptional circumstances, be recoverable by the defendant in an action similar in its nature and object to the ancient replevin or detinue. Courts of equity, however, very rarely interfered in controversies concerning the title to and possession of chattels.

B. The Particular Questions which arise under the First Clause or Branch of the Statutory Definition.

§ 768. The language of the first clause or branch of the definition, which is found in all the codes except those of Indiana and Iowa, and which is now to be interpreted, is: "A cause of action arising out of the contract or transaction set forth in the complaint [petition] as the foundation of the plaintiff's claim, or connected with the subject of the action." Following the order of this language, it is plain that three different subjects are embraced within it, and the whole discussion must therefore be separated into three corresponding divisions: namely, 1. Cases in which the cause of action alleged as a counterclaim arises out of the *contract* set forth in the complaint; 2. Those cases in which it arises out of the *transaction* set forth in the complaint; 3. Those cases in which it is *connected with* the subject of the action. A complete examination of these three subdivisions requires a construction of certain particular phrases which form a part of the statutory definition. These are (a) "foundation of the plaintiff's claim," or when is a contract or transaction the foundation of the plaintiff's claim? (b) "arising out of," or when does a cause of action arise out of a contract or transaction? (c) "transaction;" (d) "subject of the action;" (e) "connected with," or when is a cause of action connected with the subject of the action? Although the signification of all these phrases and terms must be determined, for upon it depends the interpretation to be given to the entire provision, yet it will be impracticable to take them up and examine them separately. Each is so connected with the others, that, in ascertaining their sense, all must be considered together. The courts have invariably pursued this method; and their opinions, from which our interpretation will be taken, have always construed the statutory clause as a whole, and have not attempted to distinguish and analyze its constituent parts. I shall therefore pursue the order

already mentioned, and shall discuss the three subdivisions into which the subject has been separated, and in so doing shall incidentally define the legal import of the several phrases and terms above enumerated. The decisions which have given, or have attempted to give, a construction to the clause are numerous and conflicting. I shall freely refer to these cases, citing those which represent all theories and schools of interpretation, and shall endeavor to collect from them such doctrines and practical rules as seem to be correct upon principle and to be supported by the weight of authority. As a preliminary step to the discussion of the three subordinate heads, I shall quote and analyze certain judicial opinions which have treated of the clause as a whole, and have proposed general rules by which its meaning may be determined. Having thus ascertained these general rules, I shall inquire what particular cases or classes of cases do or do not fall within one or the other of the three subdivisions before mentioned.

§ 769. *General Principles of Construction.* The cases now to be cited throw more or less light upon the meaning of the statutory clause as a whole, and also, to a certain extent, upon that of the special phrases and terms which it contains; and from them some general principles of interpretation can be inferred. The lower floor of a building having been leased, the landlord brought an action for rent due. The answer was pleaded as a counterclaim. It alleged that the plaintiff occupied the upper floors of the building; that he wantonly and negligently suffered water-pipes to get out of repair and to leak, and by this means caused filthy water to come upon the defendant's premises; also that plaintiff wantonly and negligently caused filthy water to be thrown from his rooms upon defendant's premises; that by these acts damages were caused to the defendant in an amount specified, for which judgment was demanded against the plaintiff. A demurrer to this answer having been sustained, the defendant appealed to the New York Court of Appeals, which affirmed the decision below.¹ As already said in a former chapter, the diffi-

¹ Edgerton v. Page, 20 N. Y. 281, 285. From the opinion of that court the following extracts are taken: "The demand of the defendant set out in the answer does not arise out of the contract set forth in the complaint. That contract is for the

payment of rent upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff in permitting water to leak and run into the premises, and in causing it to be thrown upon the premises and prop-

culty in arriving at the true interpretation of the term "transaction" lies in the fact that it had no strict *legal* meaning before it was used in the statute. Being placed in immediate connection with the word "contract," and separated therefrom by the disjunctive "or," one conclusion is *certain at all events*; namely, that the legislature intended by it something different from and additional to "contract." The most familiar rules of textual interpretation are violated by the assumption that no such signification was intended. The only question at all doubtful is, How far did the law-makers design to go, and how broad a sense did they attach to the word? Is it to be used in its widest popular meaning, or must it be narrowed into some limited and technical meaning, and thus be made a term of legal nomenclature? While in common speech, a single assault, or slander or lie, would not be called a "transaction," yet the whole series of events grouped around such a central fact, and connected with it, would, I think, be so designated in popular language, and a fraudulent scheme, or

erty of the defendant. These acts are entirely independent of the contract of hiring, upon which the action is brought. The demands are not connected with the subject of the action; *that is, the rent agreed to be paid for the use of the premises.* The defendant's demands are for a series of injuries to his property deposited upon the premises, and for impairing the value of the possession. It would be a very liberal construction to hold, that, in an action for rent, injuries arising from trespasses committed by the lessor upon the demised premises might be interposed as a counterclaim. The acts of the plaintiff in this case are of a similar nature. They are either acts of trespass or of negligence from which the injuries to the defendant accrued. Such a construction could only be supported by the idea that the subject of the action was *the value of the use of the premises.* But where there is an agreement as to the amount of the rent, that value is immaterial. Unless the acts of the plaintiff amount to a breach of the contract of hiring, they are not connected with the subject of the action." The opinion proceeds to show that the acts complained of were not a breach of an implied covenant of quiet enjoyment, and concludes: "There is nothing in the

answer in this case tending to show that any of the acts of the plaintiff were done under any claim of right whatever. They did not, therefore, amount to a breach of the contract created by the lease; and the injuries sustained by the defendant do not, therefore, constitute a counterclaim connected with the subject of the action." To the same effect are the decisions and the general interpretation given to the clause in *Mayor v. Parker Vein Co.*, 12 Abb. Pr. 800, 801, per Woodruff J.; *Askins v. Hearn*, 8 Abb. Pr. 184, 187, per Emott J.; *Schnaderbeck v. Worth*, 8 Abb. Pr. 37, 38, per Ingraham J.; *Drake v. Cockroft*, 4 E. D. Smith, 34, 39, per Woodruff J.; *Bogardus v. Parker*, 7 How. Pr. 303, 305; *Barhyte v. Hughes*, 38 Barb. 320, 321, per Clerke J. These cases all give a very narrow meaning to the term "transaction," and incline to the position that a cause of action on contract, and one for tort, or two causes of action for tort, can never be said to arise out of the same transaction. The last case cited, *Barhyte v. Hughes*, goes so far as to hold that "transaction" and "contract" are synonymous; in other words, that no cause of action can arise out of a "transaction" unless it springs from a contract.

in other words a cheat, is a most familiar example of the class of events to which the term is usually applied. But taking the word "transaction" in the limited sense of a "negotiation of business," or some other similar expression, it is certainly a mistake to say that torts cannot arise out of it different from and adverse to the plaintiff's cause of action. In the first place, it is certain that a cause of action based upon the plaintiff's *fraud* may arise out of such a "transaction," for it may spring from a contract pure and simple. In the second place, as the "negotiation" or "business" or "conduct of affairs" may be concerned with property, with the title to or possession of land or chattels, it is easily conceivable that a distinct cause of action in favor of the defendant may arise out of a tort to property committed by the plaintiff in the course of the "business" or "negotiation" or "conduct of affairs," such as a claim for the taking or conversion of goods, or for a trespass to or wrongful detention of land. Indeed, the difficulty in conceiving of distinct torts arising from one and the same "transaction" is confined almost entirely to the cases of torts to the person. It may be noticed that most of the decisions already cited, in which the possibility of distinct torts having such a common legal origin is denied, directly relate to personal wrongs alone; and the reasoning of the courts is extended from them to *all* torts, without any discrimination between their different classes, and the different rules which may govern them.

§ 770. The cases thus far cited have all been decided by courts of New York; I shall now quote a few which have arisen in other States. A complaint alleged that the plaintiff delivered certain flour to the defendant to be sold on commission, but that the latter had converted the same, or the proceeds thereof, to his own use, and prayed judgment for its value as damages. The answer set up the following facts as a counterclaim: that defendant had leased a flouring-mill to the plaintiff, who covenanted in the lease that he would furnish to defendant constant employment during the continuance of the term for two teams in drawing flour to Milwaukee at a stipulated sum for each load, and further covenanted that all the flour sent from the mill should be delivered to the defendant at Milwaukee, to be sold by him on commission, in pursuance of which agreement the flour mentioned in the complaint was in fact delivered; that the plaintiff had neglected and

refused to perform both of his said covenants, by reason of which the defendant had sustained damages to a specified amount, and judgment was demanded for such sum. A demurrer was interposed to this counterclaim, and was sustained by the Supreme Court of Wisconsin.¹ This opinion, quoted at large in the note, necessarily leads to the conclusion that when the plaintiff has an election to adopt one or the other of two forms of remedy, one on the contract for the breach thereof, and the other in tort for a conversion, and the like, the ability of the defendant to plead a counterclaim depends upon the kind of action selected; in other words, the propriety of the counterclaim does not depend upon the actual facts out of which the plaintiff's remedial rights arise, but upon the mere nature of the remedy which he elects to enforce, and of the means which he employs for such enforcement. The result would be, that by changing the kind of action the plaintiff may cut off a counterclaim otherwise admissible. In my opinion, it was not the intention of the legislature, in adopting the reformed procedure, that the essential rights of defendants should be made to rest in this manner upon the form of remedy chosen by the plaintiffs.

¹ *Scheunert v. Kaehler*, 28 Wisc. 528, per Dixon C. J.: "Assuming that a counterclaim may be pleaded to an action of tort,—a question not necessary to be decided,—and assuming also that no objection exists, because the contract for the breach of which the defendant claims damages is not set forth in the complaint, but that the counterclaim would be admissible, if at all, under the last clause of the subdivision as being connected with the subject of the action, the question resolves itself into an inquiry as to the origin of the cause of action stated in the complaint,—whether it arises upon the contract set forth in the answer, or originates in facts outside of and disconnected with that contract. If the former, then the counterclaim would seem to be clearly within the statute; but, if the latter, then it would not be." The opinion states that the plaintiff might have sued upon contract for a violation of it, or might have sued in tort for the wrong done him, and that he had chosen the latter form of action, and adds: "The subject of the action

is the tort or wrong done in the conversion of the money; that is the foundation, and the sole foundation, of the plaintiff's claim in this form of action; for, unless the money was unlawfully converted, the action cannot be maintained." The counterclaim was, therefore, held to be inadmissible. See also *Akerly v. Vilas*, 21 Wisc. 88, 109, 110, which holds that the counterclaim must be *directly* connected with the subject of the plaintiff's action, or so connected that a cross-bill would have been sustained, or a recoupment allowed under the former practice, when it is claimed to fall within the last clause of the first subdivision; and *Vilas v. Mason*, 25 Wisc. 810, 821, where, in an action brought upon a contract,—on a lease against the tenant,—a counterclaim for the conversion of chattels which the defendant had placed upon the demised premises, was sustained, on the ground that both causes of action arose out of the same transaction; also *Ainsworth v. Bowen*, 9 Wisc. 848.

§ 771. In a case already quoted under a former head, an action brought to set aside a deed of lands on account of the defendant's fraud, to which a counterclaim was pleaded denying the fraud, alleging the validity of the conveyance, the plaintiff's continued possession of the land and pernaney of the rents and profits, and praying a judgment awarding possession, quieting title and giving damages, the Supreme Court of Indiana sustained the answer, and granted the relief demanded by the defendant.¹ The same court has discussed the legal meaning of the phrases "arising out of" and "connected with," and has arrived at one general principle, at least, which may aid in determining their application to all particular cases. The action was to recover money deposited with the defendant who had refused to deliver it when demanded. The defendant pleaded by way of counterclaim, that the plaintiff had falsely charged him with stealing the money deposited, and had slandered him by uttering such charge in the presence of others, and prayed judgment for damages. In sustaining a demurrer to this answer the court suggested a rule of construction which may be followed in all cases.² The High Court of Appeals in Kentucky has construed

¹ Woodruff v. Garner, 27 Ind. 4, per Frazer J. : "The plaintiff's cause of action is the alleged fraud of the defendant in procuring the deed sought to be rescinded. The defendant's cause of action averred in the counterclaim does not arise out of the plaintiff's cause of action, for it cannot even exist consistently with it. If the fraud alleged by the plaintiff was perpetrated, then the defendant cannot have any right of action whatever. So the defendant found it necessary to deny the fraud. But the deed sought to be set aside constitutes part of the transaction upon which the plaintiff and the defendant both rely for a recovery. It is the link which forms the direct connection between the two diverse causes of action. So the counterclaim for possession is connected with the cause of action of the plaintiff directly, and is therefore authorized by the statute." The "transaction" set forth in the complaint was not simply the alleged fraud: it was the entire business or matter of agreeing to sell and purchase the land, and of executing and delivering the deed in pursuance of such

agreement. The plaintiff averred that the defendant was guilty of fraud; and such fraud was therefore a part of the transaction, according to the plaintiff's version. The defendant's cause of action arose out of the same transaction,—in fact, it was the entire transaction, except the element of fraud, which he asserted did not exist. No plainer illustration of a cause of action arising out of the transaction which was also the foundation of the plaintiff's claim could be imagined.

² Conner v. Winton, 7 Ind. 523. "The question is, What is the legal effect of the words 'arising out of' or 'connected with'? Do they refer to those matters which have an immediate connection with the transaction? or do they include also those which have a remote relation with it by a chain of circumstances which were not had in view at its inception? Suppose C. [the defendant] had beaten W. [the plaintiff] for uttering the slander, could W. have replied the damages occasioned by the battery to those resulting from the slander? and could the parties have settled all their quarrels in the ac-

the phrases "arising out of the transaction" and "connected with the subject of the action" in a very liberal and broad manner. An action was brought on an injunction bond given by T. and sureties. The plaintiff had originally commenced proceedings to obtain possession of a farm in the occupancy of T. T. had thereupon brought an equitable suit to restrain these proceedings, had obtained a preliminary injunction, and had given the bond in question. The suit being dismissed, this action was brought on the bond, the plaintiff therein claiming damages for being kept out of possession of the farm by means of the injunction during the continuance of the suit. The defendant T. pleaded a counterclaim, alleging that notwithstanding the injunction, and before it was dissolved, the plaintiff — the defendant in the injunction suit — wrongfully took possession of the land and seized the crops thereon, and converted the same to his own use, and demanding judgment for the damages thus caused. At the trial the defendant had a verdict which was sustained on appeal.¹

§ 772. The New York Court of Appeals has passed upon the question, How far the form of the action chosen by the plaintiff, when he has an election to sue for a tort or on a contract, can affect the defendant's right to interpose a counterclaim, and has declared that it can produce no effect; if the defendant would have been able to plead a counterclaim to a cause of action upon an implied promise, growing out of a certain state of facts, the

tion to recover the money? We do not think that the statute contemplates any such practice. A counterclaim is that which might have arisen out of, or could have had some connection with, the original transaction *in the view of the parties*, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or non-compliance with its provisions. We refer in this connection, of course, to actions *ex contractu* only. About actions for tort it is not necessary to say any thing at present."

¹ *Tinsley v. Tinsley*, 15 B. Mon. 454, 459, per Marshall J.: "It is not required that the counterclaim itself shall be founded in contract, or arise out of the contract set forth in the petition; but it is sufficient that it arise out of the transaction

set forth in the petition, or be connected with the subject of the action. As the petition states the occupation of the land by Mrs. T. [the present defendant and the plaintiff in the equity suit] during the pendency of the injunction, and claims damages therefor, any interference by the plaintiff which rendered such occupation less profitable or less valuable to the occupant constituted a cause of action arising out of the transaction set forth in the petition, and is connected with the plaintiff's cause of action; and, although it amount to a trespass or other tort, it may constitute the ground of a counterclaim."

In *Wadley v. Davis*, 68 Barb. 500, the same principle was approved and followed; and a demand arising from tort to property was held to be a proper counterclaim in an action on contract.

plaintiff cannot, by adopting an action in form for a tort under the same circumstances, cut off or abridge this substantial privilege; the chief design of the new procedure was to subordinate form to substance and not substance to form. An action was brought to compel the delivery of certain bills of lading, the plaintiffs alleging that the shipment was on their account, and that the goods and the bills of lading thereof belonged to themselves, and were wrongfully detained by the defendants. The answer put these averments in issue, and also set up by way of counterclaim that, since the commencement of the action, the plaintiffs had wrongfully taken possession of the goods, and had converted the same to their own use, and prayed judgment for the value thereof. The court pronounced the defendants' demand to be a cause of action plainly arising out of the transaction set forth in the complaint, or at least connected with the subject of the action, being, as it was, for the value of the very goods which the plaintiffs sought to reach, and added the following: "I do not think it lies with the plaintiffs to allege that their taking was a mere tort for the purpose of defeating the counterclaim. And, even if an action sounding in tort might be maintained by the defendants for the taking, I am still of opinion that the cause of action for the value of the goods would constitute a good counterclaim in such a case as this."¹

§ 773. I shall end this particular branch of the subject by quoting from a very able and instructive decision made by the Superior Court of New York City, in which the statutory definition was fully analyzed as to all its parts, and an attempt was made to reach the basis of a true interpretation. The action was brought to recover damages for the wrongful conversion of certain bills of exchange. The plaintiffs had been the owners of the bills which were drawn by divers persons on different payees; they indorsed the same and delivered them to the Ohio Life Insurance and Trust Company, for the purpose of collection only; this company transferred them to the defendants, who now retain them; it was alleged that the defendants took the bills with notice of all these facts, and were not holders in

¹ *Thompson v. Kessel*, 80 N. Y. 383, authorities, by the Supreme Court of 389, per Johnson J. The same doctrine has been recently approved and enforced, after an exhaustive examination of the *Missouri*, in *Gordon v. Bruner*, 49 Mo. 570, 571, per Bliss J., *supra*, § 569 n.

good faith for value. The complaint stated a demand and refusal, an unlawful detention and conversion, and demanded judgment for the value of the securities as damages; it was strictly for an alleged tort. The answer was pleaded as a counterclaim. It set up the drawing of the bills, their indorsement by the plaintiffs, their delivery to the Ohio Trust Company, their transfer to the defendants for full value and without notice, demand of payment, non-payment and notice thereof to the plaintiffs, and prayed judgment against the plaintiffs as indorsers for the amount due on the drafts. In other words, it was like an ordinary complaint in an action by the indorsees against the indorsers to recover the sum due on a bill or note. A motion to strike out this counterclaim was denied at the special term, and the plaintiffs appealed to the general term, which, after stating the facts and the questions presented by the record, and reciting the two subdivisions of § 150 of the New York Code, pronounced the opinion found in the note.¹

¹ *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 872, 889, per Woodruff J.: "This division of the section shows that there may be a counterclaim *when the action itself does not arise on contract*; for the second clause is expressly confined to actions arising on contract, and allows counterclaims in such cases of any other causes of action also arising on contract; and this may embrace, probably, all cases heretofore denominated "set-off," legal or equitable, and any other legal or equitable demand liquidated or unliquidated, whether within the proper definition of set-off or not, if it arise on contract. *Gleason v. Moen*, 2 Duer, 642. The first subdivision would therefore be unmeaning as a separate definition, if it neither contemplated cases in which the action was not brought on the contract itself in the sense in which these words are ordinarily used, nor counterclaims which did not themselves arise on contract. The first subdivision, by its terms, assumes that the plaintiff's complaint may set forth, as the foundation of the action, a 'contract' or a 'transaction.' The legislature, in using both words, must be assumed to have designed that each should have a meaning; and, in our judgment, their construction should be according to the natural and

ordinary signification of the terms. In this sense, every contract may be said to be a transaction; but every transaction is not a contract. Again, the second subdivision having provided for all counterclaims arising on contract, and all actions arising on contract, no cases can be supposed to which the first subdivision can be applied, unless it be one of three classes; viz., 1st. In actions in which a contract is stated as the foundation of the plaintiff's claim, counterclaims which arise out of the same contract; or, 2d. In actions in which some transaction, not being a contract, is set forth as the foundation of the plaintiff's claim, counterclaims which arise out of the same transaction; or, 3d. In actions in which either a contract, or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim, counterclaims which neither arise out of the same contract nor out of the same transaction, but which are connected with the subject of the action." After some discussion upon the difference between the provision in the first subdivision and that in the second subdivision in reference to actions and counterclaims based upon contract, in which he points out, that, in the former, the language is "contract which is the foundation of the

§ 774. While the foregoing decisions do not furnish any general formulas for determining in all cases what is the "transaction" set forth in the plaintiff's petition or complaint, or what is the "subject of the action," or when the defendant's cause of action "arises out of the transaction set forth in the complaint," or when it is "connected with the subject of the action," they do throw some light upon the true intent of the legislature in using these phrases, and they settle some *principles* which, when properly applied, may assist in constructing the universal rules so much needed by the profession and the bench. It is very evident that there has existed in the minds of judges a radical difference of opinion in respect to the import of the controlling terms of the statutory definition, and especially in respect to the word "transaction." One school would narrow its meaning so as to deprive it of all separate significance in the clause where it is found. They

plaintiff's claim," and, in the latter, "actions arising on contract," and that this language appropriately applies, in the first subdivision, to certain classes of actions in which a contract is the foundation of the plaintiff's claim, although the action does not strictly *arise on* the contract, and, in the second subdivision, to all those actions which are strictly *brought on* the contract, — the learned judge proceeds with the main subject: "But, secondly, the subdivision authorizes in actions in which a transaction, not being a contract, is set forth as the foundation of the plaintiff's claim, counterclaims which arise out of the same transaction. This, we think, includes the case before us. The 'transaction' here in question may either include the history of the bills, so far as the title of the plaintiffs or defendants depends upon that history; or the 'transaction' may, perhaps, be confined to the manner and circumstances of the transfer to the defendants." The opinion recapitulates the facts of the case, and shows, that, giving to the term "transaction" the first of these two meanings, the defendant's cause of action arose out of it, and adds a very important suggestion which had been overlooked in some of the decisions heretofore cited: "Some facts enter into the plaintiff's case which do not enter into the defendant's case, and *vice versa*. But, from the nature of the subject, *this must always be so*. The legislature were

not so absurd as to mean that the defendant might counterclaim when the very facts alleged by him, with all their particulars, were identical with those alleged by the plaintiff. . . . So, if the transaction set forth as the foundation of the plaintiff's claim be regarded as more narrow, and as being the transfer of the bills by the Ohio Trust Company to the defendants, then, as before, the defendants' counterclaim arises out of the same transaction; to wit, the transfer. The circumstances that the defendants have to superadd an allegation of demand, protest, and notice to the plaintiffs as indorsers, does not alter the case. This added fact is only a means of showing *how* the defendants' cause of action arises out of the transaction relied upon, and is made complete." Finally, Mr. Justice Woodruff reaches the conclusion, that, even if the defendants' cause of action does not arise out of the "transaction" set forth in the complaint, it "is directly and immediately connected with the subject of the action. The subject of the action is either the right to the possession of the bills of exchange, or it is the bills themselves. The defendants' counterclaim is not only connected with, but is inseparable from, either or both. The *object* of the action is *damages*; but the *subject* is the bills of exchange, or the right to their possession."

would make it either synonymous with "contract," or would regard it as being merely the very cause of action which the plaintiff has alleged in his pleading as the ground of recovery. The other school give to the word a broader and more comprehensive meaning. *Ex vi termini*, it imports something different from "contract," and is to be taken in its ordinary and popular sense. It is more extensive than "cause of action" or "subject of the action;" for out of it the defendant's "cause of action" is said to "arise," and it is also to be set forth in the complaint or petition, not as the "cause of action," but as the "foundation" of the plaintiff's claim. It must, therefore, be something — *that combination of acts and events, circumstances and defaults — which, viewed in one aspect, results in the plaintiff's right of action, and, viewed in another aspect, results in the defendant's right of action.* As these two opposing rights cannot be exactly the same, it follows that there may be, and generally must be, acts, facts, events, and defaults in the transaction as a whole, which do not enter into each cause of action, but are confined to one of them alone.¹

§ 775. In regard to what constitutes the "*subject* of the action," there is no agreement whatever in the judicial opinions. Some of them have treated it as identical with the "cause of action," which is plainly incorrect. As I have already shown, the "cause of action" consists in, 1st, the primary right, and the facts from which it flows; and, 2d, the breach of that right, and the facts constituting such breach. These taken together create a remedial right, and *are the cause of action.* The remedy itself is certainly the "object" of the action. The "subject" is certainly not the cause of action; but when we have reached this conclusion, we find very little judicial aid in arriving at any other and more affirmative one. Some judges have said that in all possessory actions, and all actions to establish property, the "subject of the action" denotes the *things* to assert a right over

¹ The reader should consult the analysis of cases, and the discussion in relation to the same word given in a former chapter (Chap. III., Sec. 2). The language of the clause there under examination is almost identical with that of the present passage; and the same meaning must, of course, be attributed to the words "transaction" and "subject of the action" in both sections of the statute. I do not

repeat in the text the former full discussion; but it is plain that the decisions there cited, and the results there reached, apply with equal force to the questions now under consideration. There is an evident connection between the subject of uniting causes of action in one complaint, and the uniting them in one controversy, although they are set forth in the adverse pleadings.

which, or to obtain the possession of which, the action is brought, as the land in ejectment and in many equity suits, or the chattels in replevin. Some have said that the "subject" denotes the same in other classes of actions, not brought to recover possession or expressly to establish title, but in which, nevertheless, the plaintiff's right to recover is based upon his property in a specific thing, as for the conversion of chattels, or for trespass to lands or chattels; while some have applied the same principle to actions not based upon any alleged *property* of the plaintiff in a specific thing, and have gone to the extent of holding that, in actions upon contract to recover the debt due or damages for the non-performance thereof, the "subject" is the very contract itself, — the instrument in suit, as, for example, in an action upon a bill or note, the "subject," according to this view, would be the bill or note sued upon. Other judges have said that the "subject" is the *right* which is sought to be enforced in the action; meaning thereby the *primary* right, which has been infringed upon as distinguished from the remedial right, and from the delict and the remedy. Thus in the case last quoted, which was an action for the conversion of bills, Mr. Justice Woodruff declared that the subject was either the bills themselves, or the plaintiff's original right to their possession. It would, as it seems to me, be correct to say in all cases, legal or equitable, that the "subject of the action" is the plaintiff's main *primary right* which has been broken, and by means of whose breach a remedial right arises. Thus, the right of property and possession in ejectment and replevin, the right of possession in trover or trespass, the right to the money in all cases of debt, and the like, would be the "subject" of the respective actions. Although in a certain sense, and in some classes of suits, the things themselves, the land or chattels, may be regarded as the "subject," and are sometimes spoken of as such, yet this cannot be true in all cases; for in many actions there is no such specific thing in controversy over which a right of property exists. The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped, and to which they are subordinate. In possessory and proprietary actions, this right, which will then be always one of property or of possession, will be intimately associated with the specific thing itself which is the *object* of the right; but this relation is not and

cannot be universal. It seems, therefore, more in accordance with the nature of actions and more in harmony with the language of the statute to regard the "subject of the action" as denoting the plaintiff's *principal primary right* to enforce or maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on. In this manner alone can we arrive at a *general* rule applicable to all possible cases, and the rule thus reached fully satisfies all the requirements of the legislative language, and can be invoked in all classes of actions. While I suggest and adopt this meaning of the term "subject," I freely concede that no decision, so far as I have discovered, pronounces this interpretation to be the only one admissible; many cases sanction it, none directly reject it; but none, on the other hand, have gone so far as to declare in its favor to the exclusion of all other meanings. The construction proposed, as it has been judicially approved in many instances, would remove all doubt and conflict of opinion, and would furnish a simple and practical rule of universal application.

§ 776. In respect to the phrase "connected with" the subject of the action, one rule may be regarded as settled by the decisions, and it is recommended by its good sense, and its convenience in practice. The connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. The criterion proposed by the Supreme Court of Indiana in one of the cases cited is as certain and practical as the nature of the subject admits, and only needs to be known to be universally accepted. It is, that the connection must be such that the parties could be supposed to have foreseen and contemplated it in their mutual acts; in other words, that the parties must be assumed to have had this connection and its consequences in view when they dealt with each other. I now pass, according to the order already stated, to the three branches into which the subject-matter is naturally separated.

I. Cases in which the Cause of Action alleged as a Counterclaim arises out of the Contract set forth in the Complaint or Petition as the Foundation of the Plaintiff's Claim.

§ 777. Mr. Justice Woodruff, in the opinion last quoted, declares that the second subdivision of the definition was intended

to embrace all cases in which the plaintiff's cause of action arises on contract, and the defendant's counterclaim also arises on contract, either the same or another, and that the clause of the first subdivision above mentioned was designed to include only those cases in which the contract is set forth by the plaintiff as the *foundation* of his action, although the action itself is not *on* the contract. This is, I think, attributing too much nicety and precision of thought to the legislature, and assumes that it would never enact any duplicate provisions. The first subdivision no doubt covers the cases mentioned by Judge Woodruff, but it also embraces many others. Undoubtedly, the codifiers and the legislature in drawing and adopting the first subdivision had in mind the doctrine of recoupment, and so framed the language that it should include cases of recoupment and all others, legal and equitable, analogous to it, — that is, all cases in which the right of action of the plaintiff and that of the defendant arise *from the same contract*. It describes, therefore, not only the special and infrequent classes of instances in which the plaintiff's claim is not technically *on* the contract, although a contract is set forth as its foundation, but also all other instances in which the plaintiff's action is strictly brought *on* the contract, while the defendant's counterclaim in both cases arises from the same contract. The central idea of this subdivision then is, that one and the same contract is the basis of both parties' demand for relief. Passing to the second subdivision, the central thought is equally plain, viz., that the plaintiff's cause of action, and that of the defendant, spring from different contracts; in other words, the codifiers and the legislature had in mind the familiar case of set-off, both legal and equitable. But, in framing the clause, the language was made broader than was necessary, and it actually covers all cases in which the plaintiff's cause of action is on contract, and the defendant's counterclaim is also on contract the same or another. The law-makers have thus in fact given us two provisions authorizing a counterclaim arising from the same contract as that from which the plaintiff's cause of action results, but only one authorizing a counterclaim springing from another contract than the one upon which the plaintiff's demand is based. The same case may, therefore, be often referred to both of these subdivisions; but I shall, following what seems to be the plain design of the statute, consider under the first all those

instances in which the demands of both parties arise from the same contract, and postpone to the second all those in which each demand arises from a separate contract. That this is the correct construction of the whole provision is made certain, when we turn to the form which it assumes in all the codes which constitute the second group according to the classification stated at the commencement of this section.

§ 778. It may be stated as a general proposition that in all actions to recover a money judgment, debt or damages, upon a contract, or where a contract is set forth as the foundation of the plaintiff's claim, a counterclaim of a money judgment against the plaintiff for his breach or non-performance of any stipulations of the same agreement, or for his fraud in procuring the same to be entered into, is admissible. The following examples will illustrate this proposition. In an action for rent brought by the lessor or by the grantee of the reversion against the lessee or an assignee of the term, where the lease contains a covenant to repair on the part of the landlord, damages sustained by the defendant from a breach of this covenant may be alleged, and recovered as a counterclaim. The damages in one such case, where the demised premises were a hotel, were held to be the sum paid by the defendant for making the necessary repairs, together with the amount of loss occasioned by the inability to use certain rooms in the hotel while they were out of repair.¹ In an action by the buyer against the seller to recover damages for the non-delivery of goods bargained and sold, the latter may counterclaim the unpaid price of that part of the goods already delivered under the contract.² When sued for the price of two articles sold under one agreement, the defendant may set up and recover damages resulting from the fraudulent representations of the plaintiff in respect to one of them, even though such damages exceed in amount the whole price agreed to be paid for both.³ A person having sold his business and good-will at a

¹ *Myers v. Burns*, 85 N. Y. 289; *Cook v. Soule*, 56 N. Y. 420; 1 N. Y. S. C. 116; *Benard v. Babcock*, 2 Robt. 175.

² *Leavenworth v. Packer*, 62 Barb. 132, 136.

³ *Rawley v. Woodruff*, 2 Lans. 419 and see *Hoffa v. Hoffman*, 83 Ind. 172, where damages from fraud were counter-claimed in a foreclosure suit. When, in

an action on a contract, the defendant set up a counterclaim of damages from the plaintiff's fraud, he cannot, at the trial, rely upon a mistake in making the agreement: fraud and mistake are distinct grounds of recovery or defence; and proof of one cannot be given when the other alone is pleaded, *Dudley v. Scranton*, 67 N. Y. 424, 427.

certain price, and having covenanted in the same agreement not to engage therein at the same place, and the damages for a breach of this covenant having been liquidated and fixed at a specified sum, in an action brought by the vendee to recover this amount of liquidated damages on the ground that the vendor had violated his agreement, the defendant was permitted to recover the unpaid portion of the purchase price as a counterclaim.¹

§ 779. It is settled by numerous decisions, although there were at first some expressions of a contrary opinion, that in an action to recover the price of goods sold and delivered, or bargained and sold, the purchaser's demand of damages for the plaintiff's breach of his warranty of the quality of the goods may be pleaded as a counterclaim; in fact, there can be no simpler and plainer illustration of a counterclaim arising out of the very contract set up by the plaintiff as the basis of his recovery.² When the plaintiff, who had been employed as a superintendent of the defendant's manufactory under a written agreement stipulating for his services in that capacity at a specified salary for a year, brought an action for his wages, alleging that he had been wrongfully discharged, a counterclaim of damages sustained by the defendants in their business, through the negligent and unskilful conduct of the plaintiff in violation of the provisions of the same contract, was pleaded, and was fully upheld by the court.³

§ 780. I have collected and placed in the foot-note a number of additional cases in which the answers were sustained as valid counterclaims on the ground that they arose out of the contract set forth in the complaint or petition; in some of them, however, the court merely said that they arose either from the "contract or transaction set forth" by the plaintiff, and did not distinctly determine which of these expressions was strictly the proper one to be used.⁴

¹ *Baker v. Connell*, 1 Daly, 469; and see *Ainsworth v. Bowen*, 9 Wisc. 348.

² *Lemon v. Trull*, 13 How. Pr. 248; *Warren v. Van Pelt*, 4 E. D. Smith, 202; *Dounce v. Dow*, 57 N. Y. 16; *Love v. Oldham*, 22 Ind. 61; *French v. Saile*, *Stanton's Code* (Ky.), 96; *Morehead v. Halsell*, ib. 96; *Earl v. Bull*, 15 Cal. 421; *Hoffa v. Hoffman*, 33 Ind. 172. See, *contra*, *Nichols v. Boerum*, 6 Abb. Pr. 290. This case has been expressly overruled.

³ *Lancaster, &c. Man. Co. v. Colgate*,

12 Ohio St. 344; *Stoddard v. Treadwell*, 26 Cal. 294; but see *Barker v. Knickerbocker Life Ins. Co.*, 24 Wisc. 630, in which, under exactly similar circumstances, the defendant's claim, that the contract should be cancelled, was refused, on the ground that the facts made out a perfect defence at law; but no counterclaim of damages was pleaded.

⁴ *Racine Bank v. Keep*, 13 Wisc. 209; *Butler v. Titus*, 13 Wisc. 429; *Koempel v. Shaw*, 18 Minn. 488; *Gleedell v. Thom-*

II. *Cases in which the Cause of Action alleged as a Counterclaim arises out of the Transaction set forth in the Complaint or Petition as the Foundation of the Plaintiff's Claim.*

§ 781. I shall in this subdivision pursue the same plan as in the last, and collect the various classes of cases in which counterclaims, legal or equitable, have been sustained as properly arising out of the transaction set forth in the complaint, and also those in which such attempted counterclaims have been overruled; and I shall add whatever comments, or extracts from judicial opinions, seem necessary to the clear inference and statement of the general principles and practical rules established by the courts. The import of the term "transaction," and of the phrase "arising out of," has been already discussed with some fulness. Without repeating this discussion, the cases cited will illustrate and complete it.

§ 782. The cases cited will be classified and arranged into groups according to their nature; that is, according to the relief demanded by the respective litigants. The *first* of these classes will contain cases in which the actions are legal, and both parties seek to recover a judgment for money alone. This will be subdivided into (1) Those in which the plaintiff's cause of action and the defendant's counterclaim are *in form* for debt or damages upon contract express or implied; (2) Those in which the plaintiff's cause of action is *in form* for debt or damages upon contract express or implied, and the defendant's counterclaim is for damages arising from a tort, either (*a*) for conversion of goods, or (*b*) for trespasses or injuries to property or to person, or (*c*) for fraud; (3) Those in which the plaintiff's

son, 56 N. Y. 194, 198; Isham v. Davidson, 52 N. Y. 237; Whalon v. Aldrich, 8 Minn. 348; Mason v. Heyward, 3 Minn. 182; Dale v. Masters, Stanton's Code (Ky.), 97; Dennis v. Belt, 30 Cal. 247; Wilder v. Boynton, 68 Barb. 547; Burton v. Wilkes, 66 N. C. 604, 610; Hay v. Short, 49 Mo. 139. See McKegney v. Widekind, 6 Bush, 107, as to the extent of the relief which may be granted to the defendant in a legal action, and when the contract must be reformed by an equitable proceeding. For examples of valid counterclaims where the defendant had an election to sue for a tort or on contract, see Gordon v. Bruner, 49 Mo. 570; Tins-

ley v. Tinsley, 15 B. Mon. 454; Norden v. Jones, 33 Wisc. 600, 604; but, *per contra*, see Slayback v. Jones, 9 Ind. 470. Damages resulting to the defendant from a wrongful issue of an attachment in the action may be counterclaimed, if such act of the plaintiff was a breach of the contract sued on, Waugenheim v. Graham, 39 Cal. 169, 176; but such damages cannot generally be recovered by way of a counterclaim, Hembrock v. Stark, 53 Mo. 588; Nolle v. Thompson, 3 Metc. (Ky.) 121. A counterclaim of damages from a personal tort, as, *e. g.*, a slander, is impossible, Conner v. Winton, 7 Ind. 523.

cause of action is in form for damages arising from a tort, and the defendant's counterclaim is for debt or damages upon contract; and (4) Those in which the demands of both parties are for damages arising from a tort. The *second* will contain legal actions in which the judgment is other than for money; and the *third* will embrace equitable actions.

§ 783. *First Class: Legal Actions in which both Parties demand a Money Judgment: (1.) Where the Plaintiff's Cause of Action and the Defendant's Counterclaim are in Form for Debt or Damages upon Contract express or implied.* A complaint alleged that the defendant had in his possession \$115, of which two-thirds belonged to the plaintiff, and was received by the defendant to his use, and demanded judgment therefor: the answer, besides a defence of denial, stated by way of counterclaim that the plaintiff had himself in fact received all the money in question (\$115); that one-third thereof belonged to the defendant, and was received by the plaintiff to defendant's use, and prayed judgment for such sum. This answer was adjudged to be a proper counterclaim arising out of the transaction set forth in the complaint; and the plaintiff having failed to reply, the allegations thereof were admitted.¹ Several of the decisions quoted in the last preceding subdivision may also be regarded as examples of the class described under the present head; the contract set forth by the plaintiff might be considered a "transaction." Their facts need not be repeated, and their titles will be found in the foot-note.²

§ 784. (2.) *Cases in which the Plaintiff's Cause of Action is upon Contract, and the Defendant's Counterclaim is for Damages arising from a Tort.* No little conflict will be found among the decisions which are embraced within this group. The judges have been constantly influenced by the established doctrine of the former procedure, which excluded without exception any set-off or

¹ *Clinton v. Eddy*, 1 Lans. 61. In an action upon a note, the defendant was not permitted to recover back usurious interest paid by him to the plaintiff on former loans as a counterclaim, because the demand did not arise out of the same transaction; nor as a set-off, because it did not arise on contract, *Smead v. Chrisfield*, 1 Disney, 18; but it seems a demand to recover back usurious interest paid for the very loan which is the basis of the action would be a valid counterclaim, *Martin v. Pugh*, 28 Wisc. 184.

² *Racine Co. Bank v. Keep*, 18 Wisc. 209; *Butler v. Titus*, 18 Wisc. 429; *Koempel v. Shaw*, 18 Minn. 488; *Whalon v. Aldrich*, 8 Minn. 346; *Mason v. Heyward*, 8 Minn. 182; *Dale v. Masters*, Stanton's Code (Ky.), 97; *McKegney v. Widekind*, 6 Bush, 107; *Stoddard v. Treadwell*, 26 Cal. 294; *Dennis v. Belt*, 80 Cal. 247; *Hay v. Short*, 49 Mo. 139; *Gordon v. Bruner*, 49 Mo. 570; *Wilder v. Boynton*, 68 Barb. 547.

recoupment or cross-demand that did not spring from contract. Some have gone to the length of holding that a cause of action in favor of the defendant resulting from a tort cannot possibly arise from the "transaction" set forth by the plaintiff as the foundation of his claim; others, however, have given a more liberal and comprehensive interpretation of the term. Their differing views can best be seen by a comparison of their judicial opinions. In an action for the price of a safe sold and delivered, the defendant pleaded a counterclaim, that the plaintiff had converted to his own use a safe, the property of the defendant, for the value of which he demanded judgment. The Common Pleas of New York City held that this answer was based upon tort; that the defendant had not so framed it as to waive the wrong and sue upon an implied promise for the price, and that the pleading was not a proper counterclaim. Having thus fully disposed of the issues, the court went on to declare that if the defendant might waive the tort and bring suit in form for the price, the demand would not be a valid counterclaim, because the cause of action would not arise upon contract;¹ and upon a complaint for the price of goods sold and delivered, the Superior Court of New York City rejected a counterclaim for the wrongful conversion by the plaintiff of other goods belonging to the defendant.² No allusion was made in the latter decision to the doctrine of election of remedies between an action for the tort, and one in form upon contract; and in neither of the cases could it be pretended that the defendant's demand, in whatever shape it might be put, arose out of the transaction stated by the plaintiff. On the other hand, when, in a suit upon a promissory note, the defendant pleaded as a counterclaim that he had pledged certain stocks with the plaintiff as security for the debt; that the latter had wrongfully sold them, and prayed judgment for their value, — the Supreme Court of Wisconsin, in reversing a judgment for the plaintiff rendered on the trial, assumed that the facts constituted a good counterclaim.³

§ 785. *Damages from Trespasses, Nuisances, Negligences, and the like.* In an action by the lessor for rent, an answer, which stated

¹ *Piser v. Stearns*, 1 Hilt. 86.

² *Kurtz v. McGuire*, 5 Duer. 660. See also *Steinhart v. Pitcher*, 20 Minn. 102; *Street v. Bryan*, 65 N. C. 619, actions on

contracts in which counterclaims of damages arising from unconnected torts were rejected.

³ *Ainsworth v. Bowen*, 9 Wisc. 848.

that during the continuance of the term the plaintiff erected an oven, furnace, and other apparatus for a bakery under the store demised to and occupied by the defendant, and by the use thereof had filled the premises with smoke, soot, and steam, and had injured the defendant's goods, and demanded judgment for the damages so caused, was treated as a valid counterclaim by the New York Superior Court.¹ But in a similar action the New York Common Pleas rejected a counterclaim which alleged that at the time of the letting mentioned in the complaint the plaintiff leased other premises to the defendant, and that he had before the commencement of this suit wrongfully broken into said premises and taken therefrom certain chattels of the defendant, which he had injured, destroyed, or lost, and prayed judgment, for the value of the goods so taken. The court declared that this cause of action clearly did not arise out of the contract or transaction set forth in the complaint, nor was it connected with the subject of the action : it was a naked and independent act of trespass.²

§ 786. Similar decisions have been made in other actions than those for the recovery of rent. In a suit upon a note given for the purchase price of land conveyed to the defendants, they were not permitted to counterclaim damages for the plaintiff's wrongful entry upon the land so conveyed, and cutting and carrying away a growing crop the title to which had passed by the deed.³ It has, however, been recently held by the Supreme Court in New York, that a cause of action for a tort *may* arise out of the transaction set forth by the plaintiff; and such a counterclaim was fully sustained in an action on contract.⁴

§ 787. *Damages arising from Fraud.* Cross-demands for damages resulting from fraud will naturally occur, and, it would

¹ *Ayres v. O'Farrell*, 4 Robt. 668; 10 Bosw. 148. When the cause was first before it, the court held that by replying the plaintiff had waived all objection : on the second appeal, the counterclaim was more definitely approved.

² *Drake v. Cockroft*, 4 E. D. Smith, 84, 89. See also *Gallup v. Albany R. R.*, 7 Lans. 471; *Edgerton v. Page*, 20 N. Y. 281, 285; *Mayor v. Parker Vein Co.*, 12 Abb. Pr. 300; *McKensie v. Farrell*, 4 Bosw. 192, 202, which were all actions for

rent in which counterclaims for damages from torts of the lessor were rejected.

³ *Slayback v. Jones*, 9 Ind. 470; *per contra*, see *Gordon v. Bruner*, 49 Mo. 570, 571 (which was decided on the doctrine of election); *Tinsley v. Tinsley*, 15 B. Mon. 454 459; *Smith v. Fife*, 2 Neb. 10, 13, in all which, counterclaims of damages from trespasses to land were sustained; but a counterclaim of damages arising from a personal tort cannot be sustained, *Conner v. Winton*, 9 Ind. 523.

⁴ *Wadley v. Davis*, 68 Barb. 500.

seem, might be easily sustained. But there have been decisions which reject even such counterclaims. In an action on two promissory notes, the defendants—the makers—alleged that they executed a trust deed of land as security for their notes, and proceeded to state acts of fraud committed by the plaintiff in collusion with the trustee in the deed, by which the land was sacrificed and bought in by the plaintiff at far less than its value, and prayed judgment for the damages resulting from the fraud. The Supreme Court of Missouri overruled this counterclaim in an opinion which contains many palpable errors, and which has been disregarded by subsequent decisions of the same tribunal.¹ The Supreme Court of Indiana, however, sustained a counterclaim in every way analogous to the one just described.² It would seem that little or no difficulty would be met in giving such a construction to the statutory definition as will embrace the cases of damages resulting from the plaintiff's frauds. If the action was on contract, such damages formed a most familiar example of the former "recoupment;" and it is only necessary to extend that doctrine to analogous cases in which a "transaction" is to be substituted in place of a contract.

§ 788. (3.) *Cases in which the Plaintiff's Cause of Action is for a Tort, and the Defendant's Counterclaim is in Form upon Contract.* The examples of this class of controversies have generally been actions for the wrongful conversion of goods in which the counterclaim of debt or damages upon contract was interposed, and rested either upon the theory that both demands arose out of the one transaction set forth by the plaintiff, or upon the notion that the plaintiff's cause of action might be regarded as founded upon an implied contract, the tort being waived. Such an action having been brought in form for the conversion of goods, the answer contained a counterclaim setting up a liability of the plaintiff as a stockholder in a certain manufacturing corporation, averring all the facts required by the statute to create a personal responsibility in him for a debt of the company. This attempted counterclaim was of course overruled, as it had not the least connection with the transaction stated in the complaint, nor with the subject of the action.³ I submit the following doctrine as correct on *prin-*

¹ *Jones v. Moore*, 42 Mo. 418, per Holmes J.

² *Vail v. Jones*, 81 Ind. 467.

³ *Chambers v. Lewis*, 28 N. Y. 454; 11 Abb. Pr. 210. See also *Allen v. Randolph*, 48 Ind. 496. In *Scheunert v. Kaeh-*

ciple, and as derived from a true interpretation of the statute. Whenever the facts are such that an election is given to the plaintiff to sue in form either for a tort or on contract, and if he sues on contract the defendant may counterclaim damages for the breach of that contract, the same counterclaim may also be interposed when the suit is in form for the tort: the facts being exactly the same in both phases of the action, the counterclaim would clearly arise out of the *real transaction* which was the foundation of the plaintiff's demand. The term "transaction" refers to the actual facts and circumstances from which the rights result and which are averred, and not to the *mere form and manner* in which these facts are averred. Although there are decisions which repudiate this interpretation of the codes, and reject the liberal rule drawn from it, I think the doctrine thus stated is now approved and supported by the decided weight of judicial opinion as expressed in the more recent authorities.

§ 789. The tort complained of by the plaintiff may not be a conversion of chattels. The fact that a cause of action upon contract in favor of the defendant may arise out of the transaction set forth in the complaint or petition in an action in form for damages resulting from a tort, was distinctly recognized, and the doctrine that a counterclaim setting up such a demand should be admitted, and should not be rejected in deference to notions which the new procedure was designed to supplant, was clearly and cogently enforced by the Supreme Court of Indiana in an opinion from which I make a quotation.¹

ler, 23 Wisc. 523, which was an action for the conversion of goods, a counterclaim of damages from the breach of the contract between the parties out of which the plaintiff's cause of action arose was rejected, the court adding, that it must also have been rejected even had the plaintiff brought his suit *in form* on the contract, which he might have done, because the right of action would still in fact be for a tort.

¹ Judah v. Trustees, &c., 16 Ind. 56, 60. The plaintiffs — trustees of the Vincennes University — sue to recover the value of certain bonds belonging to the corporation, received by the defendant as its attorney, and converted by him to his own use. He admits the receipt and de-

tention of the securities, and alleges, by way of counterclaim, that the university was indebted to him for certain professional services, particularly described, including his services in procuring these very bonds, among others, to be issued to it by the State, and prays judgment for the amount of such indebtedness. In pronouncing upon the validity of this answer as a counterclaim, the court say: "The point is, that the action is in form trover, — an action *ex delicto*, — and that, under such action, the defendant cannot avail himself of any claim which he may have against the plaintiffs for services rendered, or money expended, on their behalf, even if it was in the recovery of the identical property which is the sub-

§ 790. (4.) *Cases in which the Demands of both Parties are for Damages arising from Tort.* Counterclaims of damages from torts, when attempted to be enforced against causes of action for damages also arising from other torts, have, with few exceptions, been rejected. The courts have been inclined to adopt, or at least to assume, a general principle that such a cross-demand can never arise from the transaction set forth by the plaintiff as the foundation of his claim. It will be seen, however, that this doctrine has not been universally accepted. In all the cases placed in the foot-note, the proposed counterclaims were overruled on the ground that the cross-demands were for unconnected torts.¹ Opposed to this array of authorities, all announcing the same general doctrine, there are a few cases which sustain a counterclaim of tort against a tort under special circumstances.²

ject of the present action. We are clear that it was the intention of those who initiated and inaugurated the present Code of Procedure that parties litigant might, and perhaps should, determine in each suit all matters in controversy between them which could legitimately be included therein, keeping in view their substantial rights. As proceedings so distinct as those were at law and in equity are no longer required to be separated, but are now blended in one action, we are unable to see any reason for requiring two actions to determine a controversy in which the rights of each party are so dependent upon the rights of the other as in the case at bar. There is most surely an equitable view of this question, as presented in the case at bar, which renders it distinct and different from an ordinary case in which one should convert the property of another, and then set up as a defence that the owner was indebted to him for some other and distinct transaction." The Supreme Court of North Carolina has recently approved this doctrine in the most emphatic and general manner, holding that opposing demands on contract and for tort may arise out of the same transaction, *Bitting v. Thaxton*, 72 N. C. 541, 549. For a case in which such a counterclaim was rejected because it did not "arise out of the same transaction," &c., see *Pattison v. Richards*, 22 Barb. 148.

¹ *Askins v. Hearn*, 8 Abb. Pr. 184,

187; *Schnaderbeck v. Worth*, 8 Abb. Pr. 37; *Barlyte v. Hughes*, 33 Barb. 320; *Henry v. Henry*, 3 Robt. 614; 17 Abb. Pr. 411; *Murden v. Priment*, 1 Hilt. 75; *Shelly v. Vanarsdoll*, 23 Ind. 548; *Lovejoy v. Robinson*, 8 Ind. 399; *Macdougall v. Maguire*, 35 Cal. 274, 280; the last case holding that the objection is not removed by replying and going to trial instead of demurring.

² *Tarwater v. Hannibal & St. Jo. R. R.*, 42 Mo. 193. In *McArthur v. Green Bay, &c. Canal Co.*, 34 Wisc. 189, 146, the action was brought for injuries done to the plaintiff's boat while passing through the canal, caused by a break in the canal alleged to have resulted from defendant's negligence; the defendant set up, as a counterclaim, that the break itself was caused by the plaintiff's negligence, and prayed a judgment for the damages. This counterclaim was sustained, the court saying: "If it does not arise out of the transaction set forth in the complaint, it certainly is connected with the subject of the action." See also *Walsh v. Hall*, 66 N. C. 233, 237, in which the plaintiff sued to recover possession of a horse which defendant had sold him in exchange for a tract of land, and the defendant counterclaimed damages arising from the plaintiff's fraudulent representations in reference to the land so exchanged. This case certainly carries the doctrine of counterclaim to its extreme limits.

The court of last resort in Kentucky has even gone to the extent of holding that, in an action for an assault and battery, a counterclaim of damages for an assault and battery committed by the plaintiff at the same time, and as a part of the same affray, can be interposed, because it arises out of the same transaction, thus giving to that word a very broad and liberal meaning.¹

§ 791. *Second Class : Legal Actions in which the Judgment is other than for Money.* I pass now to the consideration of legal actions in which the judgment is other than for money ; that is, for the recovery of chattels or of lands. In all instances of this class, the question would present itself, and would be the controlling one, whether the counterclaim has such a relation to the plaintiff's cause of action that a recovery upon it would defeat, lessen, or modify the relief which would otherwise be obtained by him. The practical question, therefore, is, When, if ever, may there be a counterclaim of money in an action brought to recover possession of chattels ? In some exceptional cases such counterclaims have been allowed, and in my opinion properly allowed. For example, an answer stating the circumstances under which the goods demanded by the action came into the defendant's possession, that the plaintiff was indebted to him in a specified amount, that the chattels were delivered to him as a security for such debt, and that he held them by virtue of the lien thus created by the pledge, and demanding judgment for the debt itself, was adjudged a proper counterclaim.² The New York Court of Appeals has also sustained the counterclaim under circumstances involving the same principle.³ The result of these authorities is, that a cause of action on contract for money may so arise out of the transaction which is the foundation of the plaintiff's claim that it can be interposed as a counterclaim in an action brought to recover the possession of chattels. The case of a pecuniary counterclaim in an action to recover possession of lands has already been fully discussed.

§ 792. *Third Class : Cases in which the Plaintiff's Cause of Action, or the Defendant's Counterclaim, or both, are equitable in their Nature.* The general subject of equitable counterclaims

¹ *Slone v. Slone*, 2 Metc. (Ky.) 339.

² *Thompson v. Kessel*, 30 N. Y. 383.

³ *Brown v. Buckingham*, 11 Abb. Pr. 389 ; *per contra*, see *Moffat v. Van Doren*, 387 (Sp. Term). See also *Walsh v. Hall*, 4 Bosw. 609. 66 N. C. 233, 237 ; but see, *per contra*, *Gottler v. Babcock*, 7 Abb. Pr. 392 (n.).

has already been examined, and illustrated by numerous examples. It is thoroughly settled as a fundamental doctrine of the new procedure in relation to pleading, that an equitable counterclaim may be interposed to a legal cause of action, and *a fortiori* to one which is itself equitable. I shall not repeat the discussion to be found in a former part of this section, but shall simply collect in the note a few examples which will illustrate the modes by which such species of cross-demands may arise out of the transactions set forth by the plaintiff in his complaint or petition.¹

III. *Cases in which the Cause of Action alleged by the Defendant as a Counterclaim is or is not connected with the Subject of the Action.*

§ 793. Little need be added under this particular head to what has been already said in the foregoing subdivisions. The cases cited in the preliminary general discussion contain all the most important attempts to give a judicial construction to the phrase "connected with the subject of the action;" many of those which have been quoted to explain and illustrate the clause "arising out of the transaction," &c., were also referred by the courts which decided them to the language of the statutory definition now under consideration, — that is, the counterclaims were held valid because they were "connected with the subject of the action," as well as because they "arose out of the transaction set forth in the complaint." Finally, it may be said that each one of the cases in which the counterclaim was overruled is an

¹ *Sandford v. Travers*, 40 N. Y. 140, 143; *Akerly v. Vilas*, 15 Wisc. 401; *Allen v. Shackleton*, 15 Ohio St. 145, 147; *Moberly v. Alexander*, 19 Iowa, 182; *Hill v. Butler*, 6 Ohio St. 207, 216. The foregoing were foreclosure suits of purchase-money mortgages, in which the mortgagor counterclaimed damages for the breach of the covenants of title in the plaintiff's deeds, or for the breach of some other collateral agreement, or for the plaintiff's fraud; but, in such an action, a counterclaim for a slander of title in respect to the land cannot be sustained, *Akerly v. Vilas*, 21 Wisc. 88, 109; *Briggs v. Seymour*, 17 Wisc. 255. It has been inti-

mated that in a mortgage foreclosure suit a counterclaim of debt or damages on any contract is proper, *Briggs v. Seymour*, 17 Wisc. 255. The following were actions for other kinds of equitable relief: *Grimes v. Duzan*, 32 Ind. 361; *Woodruff v. Garner*, 27 Ind. 4 (actions to set aside a deed of land); *Eastman v. Linn*, 20 Minn. 433 (to quiet title); *Vail v. Jones*, 31 Ind. 467; but if the cross-demand does not arise out of the transaction which is the foundation of the plaintiff's cause of action, and is not connected with the subject of his action, it cannot be a counterclaim, *Town of Venice v. Breed*, 65 Barb. 597, 605.

illustration of a demand in favor of the defendant *not* connected with the subject of the action.

§ 794. The language of the phrase is exceedingly general and vague. To construe it requires a satisfactory interpretation of the terms "subject of the action" and "connected with." It may, I think, be regarded as settled that the connection here spoken of must be direct and immediate. At the same time, it must be considered as something different from "arising out of;" in other words, the defendant's cause of action may be sufficiently "*connected with* the subject of the action," although it do not "*arise out of* the transaction." It can hardly be said, however, that the courts have definitely settled what is a sufficient connection of itself, when not so complete that the defendant's cause of action could also be said to arise out of the transaction set forth by the plaintiff; unfortunately, in nearly all the cases where the judges have held that the counterclaim was connected with the subject of the action according to the true meaning of the statute, they have also said that it arose out of the transaction stated in the complaint. The most that can be asserted with any degree of assurance is, that the connection must be immediate and direct, and something that the parties can be assumed to have contemplated in their dealings with each other. I shall merely cite in the note a few cases which contain a discussion of the clause, and serve to illustrate and explain its scope and operation.¹

C. Counterclaims embraced within the Second Subdivision of the Statutory Definition and Set-offs.

§ 795. The form of this provision, as found in the codes which make up the first group, as originally classified at the commencement of this section, is, "2. In an action arising on contract, any other cause of action also arising on contract, and existing at the commencement of the action." This is substantially the

¹ *Ashley v. Marshall*, 29 N. Y. 494; *v. Thaxton*, 72 N. C. 541, 549; *Thompson v. Vose v. Galpen*, 18 Abb. Pr. 96; *Xenia Bank v. Lee*, 7 Abb. Pr. 872; 2 Bosw. 694; *McAdow v. Ross*, 58 Mo. 199, 207; 16 Ind. 58, 60; *Wadley v. Davis*, 63 Barb. 500; *Waugenheim v. Graham*, 89 Cal. 169, 176; *Nolle v. Thompson*, 3 Metc. (Ky.) 121. 189, 146; *Eastman v. Linn*, 20 Minn. 433; *Walsh v. Hall*, 66 N. C. 233, 237; *Bitting*

definition of "set-off" given in the codes of the second group. The language of this clause plainly includes all cases of counterclaim based on contract when the plaintiff's cause of action is also on contract. Since, however, the first branch of the definition covers all those instances where the counterclaim and the plaintiff's right of action both spring from the same contract, the discussion of this second subdivision will be confined to the instances in which, the cause of action being on contract, the counterclaim arises from a different contract. For the reasons before given, and which need not therefore be repeated, this construction of the two parts into which the entire definition is divided seems to me to be in conformity with the plain intent of the legislature and the evident design of the statute.

§ 796. In reference to the most important and controlling requisite of this provision and that defining set-off, no questions of difficulty can arise, since the language itself is so simple and direct that no room is left for doubt as to the construction. If the plaintiff's cause of action arises on contract, any counterclaim, legal or equitable, or set-off, also arising on contract, is admissible, provided the general rule heretofore stated is complied with, that the relief granted to the defendant shall in some manner interfere with, lessen, or modify, if not destroy, that otherwise obtained by the plaintiff. This clause greatly enlarges the scope of the former legal "set-off," for it admits demands for unliquidated damages as well as for debts or amounts ascertained and fixed by the stipulations of the parties. It is also much broader in its operation than the "equitable set-off," which was permitted by Courts of Chancery, for affirmative equitable relief may be obtained by the defendant which would come within no description of an "equitable set-off," as the term was formerly understood. So far as relates to the *subject-matter*, therefore, in all actions to recover money, either debt or damages arising on contract, any counterclaim of debt or damages arising on another contract is valid. When the relief asked for by the plaintiff, or that demanded by the defendant, is equitable, whether the counterclaim is proper must depend upon the nature of these reliefs; that is, upon the fact of their interfering with each other so that one tends to destroy, or at least to modify, the other. While there can be little or no difficulty, therefore, in applying this provision, so far as the subject-matter of the counterclaim is con-

cerned, certain collateral questions are presented, either expressly or impliedly, by the clause, which are not always so easy of solution. One of these is involved in the requirement that the cause of action constituting the counterclaim must be "existing at the commencement of the action." Another is implied in the phrase "arising on contract." Can a cause of action be said to "arise on contract" when it results from facts which amount to a tort, and would enable the injured party to bring an action in form *ex delicto*? In other words, can either party resort to an election between two kinds of proceeding, and thus make his suit or counterclaim in form "arising on contract" so as to satisfy the requisites of the statute? In treating of the topics thus suggested, I shall, *first*, consider the general requirement that the cause of action constituting the counterclaim must be existing at the commencement of the action; and shall, *secondly*, collect and classify the various cases which have been determined by the courts, and which furnish examples of counterclaims arising from different contracts. In this review the question how far a party may, for the purposes of complying with this statute, elect between an action for a tort and an action on contract, will be answered.

§ 797. The codes do not require that the contract out of which the counterclaim arises should have been originally made with the defendant. The demand may have once been in favor of some third person, and by him assigned to the defendant. When this is the case, the provision under review, as found in most of the codes, makes it necessary that the assignment should be fully completed before the action is commenced, or else the cause of action could not be "existing" in the defendant at the "commencement of the action." In the second place, the right of action, which is the basis of the counterclaim, must have accrued before the commencement of the action; the debt or damages must be both due and payable, or the claim for equitable relief must be perfect, so that a suit to enforce it could be maintained, or else the cause of action would not be "existing" in the defendant at the time specified in the statute.¹ If, then, an existing right of action is assigned to the defendant after the action against him is

¹ In one or two of the codes, however, the defendant at the time the action was commenced, *Shannon v. Wilson*, 19 Ind. it is sufficient that the demand is due and payable when pleaded, if it was held by 112.

commenced; or if a claim on contract is transferred to him before that time, but does not become due and payable or enforceable until after the suit is begun; or, lastly, if a claim is existing in favor of the defendant at the time the action is commenced by virtue of a contract originally made with him, but does not become payable or enforceable until after that time, — in none of these cases can the demand be set up by him as a counterclaim in the action. The answer must also allege that the demand was existing in favor of the defendant when the action was commenced. These positions are fully sustained by the decisions.¹

§ 798. I now proceed to inquire, What causes of action on contract, and on what contracts, may be counterclaimed under this second branch of the definition? It may be stated as the universal rule that, in an action on contract to recover debt or unliquidated damages, the defendant may counterclaim debt or damages arising on another contract, whether such damages are unliquidated or ascertained. But in the absence of statutory requirement he is not obliged to do so; he may refrain from urging his demand in this manner, and may enforce it in a separate action.² A few early cases lay down a different doctrine,

¹ Rice v. O'Connor, 10 Abb. Pr. 362; Van Valen v. Lapham, 5 Duer, 689; Gannon v. Dougherty, 41 Cal. 661; Rickard v. Kohl, 22 Wisc. 506; Newkirk v. Neild, 19 Ind. 194. If the demand had been actually transferred to the defendant by an absolute verbal assignment before the commencement of the action, although the written assignment of the same was executed after that date, it can be used as a counterclaim, West v. Moody, 88 Iowa, 187, 189; Cottle v. Cole, 20 Iowa, 485; Conyngham v. Smith, 16 Iowa, 471. It is held, in North Carolina, that, if the counterclaim is not barred by the statute of limitations at the time the suit is commenced, it is good, although the statutory time may have elapsed when it is actually pleaded, Brumble v. Brown, 71 N. C. 518, 516.

² Lignot v. Redding, 4 E. D. Smith, 285; Schubart v. Harteau, 84 Barb. 447, per Ingraham J.; Atwater v. Schenck, 9 Wisc. 160, 164, per Cole J., an action on a note, counterclaim of the amount due for the price of land sold; Conway v. Smith, 18 Wisc. 125, 139, per Paine J., counterclaim

of damages for non-performance of a building contract by the builder; Bidwell v. Madison, 10 Minn. 13, action by a bank on a note, counterclaim of damages from the negligence of the bank in not collecting another note left with it for collection; Louisville, &c. R. R. v. Thompson, 18 B. Mon. 785, 742, action by a railroad to recover stock-subscription, counterclaim of damages from a breach of an agreement to pay for land taken by the railroad; Williams v. Weiting, 8 N. Y. Sup. Ct. 439, 440, action by a veterinary surgeon to recover for professional services; counterclaim, that defendant bought a span of horses, relying upon plaintiff's knowledge and recommendation, and promise to pay for them if they were not good, &c., — breach, and damages. Held, a good counterclaim, that plaintiff's promise was binding, the defendant's prejudice in buying them being a sufficient consideration. That defendant need not set up his cross-demand as a counterclaim, see Douglas v. First Nat. Bank, 17 Minn. 85; Emmer-son's Administrator v. Herriford, 8 Bush, 229, and cases cited; Woody v. Jordan,

and require the damages to be liquidated so that they would constitute a good set-off under the ancient rules; but these decisions are palpably erroneous, and are completely overruled.¹ The right of action must of course arise out of contract, or be on contract; and it has been doubted whether the claim for contribution by one surety against a co-surety so arises from contract that it may be counterclaimed in an action brought upon another contract.² This doubt, in my opinion, is altogether too refined. Whatever may have been the equitable origin of the claim of one surety against another, it is very well settled that he could maintain a common-law action of assumpsit to recover his contributory share. This shows that the *law* treated the liability as one arising from an implied promise. In presenting his counterclaim the defendant must conform to all the requirements of pleading by plaintiffs in stating their causes of action. All the facts constituting the cause of action must be averred in the same manner and with the same degree of particularity as would be requisite were the pleading a complaint or petition.³

§ 799. In an action on an ordinary contract the defendant may set up as a counterclaim a judgment which he has recovered against the plaintiff, and this without leave first obtained from the court, where such leave is necessary in order to *sue* on the judgment.⁴ The doctrine also applies to those rights of action which, although allowed only by statute, are regarded as arising on an implied promise, and under the old system would have been enforced by an action *ex contractu*. As, for example, where the plaintiff sued to recover back money lost by a wager and paid to the defendant, a counterclaim of a similar demand against the plaintiff, originally in favor of a third person and duly assigned to the defendant, was sustained by the New York Supreme Court.⁵ It is now established in opposition to some of the earlier deci-

69 N. C. 189, 197. For an example of this species of counterclaim or set-off, see *Mullendore v. Scott*, 45 Ind. 118; *Curtis v. Barnes*, 80 Barb. 225, action for goods sold, counterclaim of damages from the breach of an arbitration bond.

¹ See, *e. g.*, *Evens v. Hall*, 1 Handy, 484 (Cincinnati Sup. Ct. at Sp. Term). This construction is given to the provision in Nebraska: it is held that a claim for unliquidated damages even on contract cannot be set off under a clause

identical with the second subdivision in the codes of the first group, *Boyer v. Clark*, 8 Neb. 161, 168, 169.

² *Schmidt v. Coulter*, 8 Minn. 492.

³ *Holgate v. Broome*, 8 Minn. 243, a counterclaim held bad because defendant did not state his cause of action for goods sold and delivered with sufficient fulness.

⁴ *Wells v. Henshaw*, 8 Bosw. 625; *Clark v. Story*, 29 Barb. 295.

⁵ *McDougall v. Walling*, 48 Barb. 364.

sions which have been expressly overruled, that a demand growing out of the unsettled partnership transactions between the plaintiff and defendant may be pleaded as a counterclaim. It is necessary, however, that the defendant should not only aver the existence of such unsettled transactions and ask an accounting, but allege that upon such accounting a balance will be found due him from the plaintiff, and he must demand judgment therefor. Without the averment of such a balance, the counterclaim will be bad on demurrer.¹

§ 800. An executor *de son tort* becomes liable to those interested in the estate to the extent of the value of the property which he appropriated; this is not the liability of a mere tortfeasor towards the owner of the thing injured: it is the same liability which flows from the ordinary trust relation of executor towards the creditors and legatees, enforceable by actions of accounting, &c. It has been held, therefore, that such responsibility of the plaintiff may be interposed as a counterclaim by a defendant sued on contract, when he is a creditor of the estate with which the plaintiff has wrongfully intermeddled.² An action by a pledger of stocks against the pledgee, to recover damages for their wrongful sale at private sale and without notice, has been said to be on contract and not for conversion, and for that assigned reason a counterclaim based upon another contract was held admissible.³

¹ *Hendry v. Hendry*, 82 Ind. 849; *Waddell v. Darling*, 51 N. Y. 827, 880; *Clift v. Northrup*, 6 Lans. 880; *per contra*, *Hammond v. Terry*, 8 Lans. 186; *Ives v. Miller*, 19 Barb. 196; *Iliff v. Brazill*, 27 Iowa, 181; *Haskell v. Moore*, 29 Cal. 487.

² *McKenzie v. Pendleton's Administrator*, 1 Bush, 164. As a general rule, when a receiver, executor, administrator, or trustee sues to recover a debt due to the estate in his hands, a demand of the defendant for services rendered on the employment of the plaintiff beneficial to the estate is a good counterclaim, *Davis v. Stover*, 58 N. Y. 478.

³ *Seaman v. Reeve*, 15 Barb. 454. The following cases give a construction to the language of the clause defining "set-off" as it is found in the second group of codes: *Evens v. Hall*, 1 Handy, 484;

Smead v. Chrisfield, 1 Disney, 18; *Anthony v. Stinson*, 4 Kans. 211; *Collins v. Groseclose*, 40 Ind. 414, 416; *Curran v. Curran*, 40 Ind. 478, 480-484, and cases cited; *West v. Moody*, 33 Iowa, 187, 189; *Remington v. King*, 11 Abb. Pr. 278; *Williams v. Brown*, 2 Keyes, 486; *Schiefelin v. Hawkins*, 1 Daly, 289; *Berry v. Brett*, 6 Bosw. 627; *Roberts v. Carter*, 38 N. Y. 107; *Miller v. Florer*, 15 Ohio St. 149; *Stanberry v. Smythe*, 18 Ohio St. 495; *Ross v. Johnson*, 1 Handy, 888; *McCullough v. Lewis*, 1 Disney, 564; *Mortland v. Holton*, 44 Mo. 58; *Jones v. Moore*, 42 Mo. 413; *Lamb v. Brolaski*, 38 Mo. 51; *Kent v. Rogers*, 24 Mo. 806; *Brake v. Corning*, 19 Mo. 125; *Mahan v. Ross*, 18 Mo. 121; *Pratt v. Menkens*, 18 Mo. 168; *House v. Marshall*, 18 Mo. 868; *Smith v. Steinkamper*, 16 Mo. 150; *Griffin v. Cox*, 30 Ind. 242; *Blew v. Hoover*, 30

§ 801. It may be regarded as a doctrine established by the overwhelming weight of authority, that, whenever by the principles of the law, independent of the new procedure, a cause of action may be treated as arising either from tort or on contract, and the party holding the right may elect between the two kinds of remedial proceeding, and does in fact elect to sue on contract, the demand thus determined to be upon contract may be counterclaimed against a plaintiff's cause of action arising on *another* contract, or when itself set up by a plaintiff, it may be opposed by a counterclaim arising out of another contract.¹ The only question of doubt in the practical application of this doctrine relates to the necessity of indicating the election in the pleading itself; or, in other words, whether the demand may not be thus used as a counterclaim, or against a counterclaim, even though the pleading contains no averments showing the election to have been actually made. While the courts have generally sustained this doctrine, they are not absolutely unanimous. The Supreme Court of Minnesota holds that the code has abolished this rule and the right of electing between the different forms of action *ex contractu* and *ex delicto*; or, rather, has destroyed all possibility of the advantage which could once have been derived under the circumstances above mentioned from such an election.² This

Ind. 450; Stilwell v. Chappell, 80 Ind. 72; Grossman v. Lauber, 29 Ind. 618; Lewis v. Sheaman, 28 Ind. 427; Dayhuff v. Dayhuff's Administrator, 27 Ind. 158; Sayres v. Linkhart, 25 Ind. 145; King v. Conn, 25 Ind. 425; Keightley v. Walls, 24 Ind. 205; Durbon v. Kelly's Administrator, 22 Ind. 188; Indianapolis, &c. R. R. v. Ballard, 22 Ind. 448; Fankboner v. Fankboner, 20 Ind. 62; Shannon v. Wilson, 19 Ind. 112; Schoonover v. Quick, 17 Ind. 196; Irish v. Snelson, 16 Ind. 865; Reilly v. Rucker, 16 Ind. 808; Knouer v. Dick, 14 Ind. 20; Fox v. Barker, 14 Ind. 309; Bool v. Watson, 18 Ind. 387; Turner v. Simpson, 12 Ind. 418; Blankenship v. Rogers, 10 Ind. 333; Johnson v. Kent, 9 Ind. 252; Lovejoy v. Robinson, 8 Ind. 399; Woodward v. Laverty, 14 Iowa, 881; Cook v. Lovell, 11 Iowa, 81; Campbell v. Fox, 11 Iowa, 318; Eyre v. Cook, 10 Iowa, 586; Stadler v. Parmelee, 10 Iowa, 23; Donahue v. Prosser, 10 Iowa, 276; Reed v. Chubb, 9 Iowa, 178; Sample v. Griffith,

5 Iowa, 376; Davis v. Milburn, 3 Iowa, 168; Dorsey v. Reese, 14 B. Mon. 157; Lansdale v. Mitchell, 14 B. Mon. 350; Clark v. Finnell, 16 B. Mon. 337; Graham v. Tilford, Stanton's Code, 98; Thatcher v. Cannon, 6 Bush, 541; Eversole v. Moore, 3 Bush, 49; Haddix v. Wilson, 3 Bush, 523; Miller v. Gaither, 3 Bush, 152; Brown v. Phillips, 3 Bush, 656; Taylor v. Stowell, 4 Metc. 175; Shropshire v. Conrad, 2 Metc. 143; Geoghegan v. Ditto, 2 Metc. 433; Finnell v. Nesbitt, 16 B. Mon. 354; Naglee v. Palmer, 7 Cal. 543; Hobbs v. Duff, 23 Cal. 596; Russell v. Conway, 11 Cal. 93; Naglee v. Minturn, 8 Cal. 540; Marye v. Jones, 9 Cal. 335; Howard v. Shores, 20 Cal. 277; Collins v. Butler, 14 Cal. 223; Lubert v. Chauviteau, 3 Cal. 458; Ricketson v. Richardson, 19 Cal. 381; Corwin v. Ward, 35 Cal. 195.

¹ See Norden v. Jones, 33 Wisc. 600, 604. See Ogilvie v. Lightstone, 1 Daly, 129.

² Folsom v. Carli, 6 Minn. 420.

opinion is based upon a close and logical adherence to the letter and to the spirit of the code, which require that the *facts* constituting the cause of action should be averred in a pleading, and abolish all forms of action.

§ 802. In all the foregoing examples the actions were legal. Some illustrations will now be given of those that are equitable. Many species of equitable actions may arise on contract within the meaning of the statute, and equitable remedies may thus be obtained as counterclaims under the second branch of the definition. A suit was brought to compel the conveyance of land alleged to be held by the defendant in trust for the plaintiff. The defendant was a lawyer, and the plaintiff had been his client. As such attorney, he had agreed, it was said, to bid in the land at a public sale, and to hold it for the plaintiff: he did, in fact, purchase it in his own name, but retained it for himself, and refused to convey. In his answer to these allegations, the defendant, besides denials, pleaded, as a counterclaim, a debt due from the plaintiff for professional services in relation to this and other matters. Evidence to sustain this counterclaim was rejected at the trial, for the reason that the defendant had forfeited all claim to compensation on account of his fraudulent practices. The Superior Court of New York City, in reversing this decision, held, that, as the action was on contract, the counterclaim was admissible, and, even if the defendant had been guilty of wrong in one matter, his right to compensation in respect of other matters was not affected; also, that, on the facts as proved, he had committed no fraud or breach of his fiduciary duty in the instances charged against him.¹ In an action to foreclose a purchase-money mortgage, it is well settled that the mortgagor may interpose a counterclaim for the damages sustained by him from the breach of covenants in the plaintiff's deed of conveyance. Both causes of action arise from contract, though from different contracts.²

§ 803. The counterclaim of a money demand on an independent and separate contract may be interposed in the action to foreclose *any* mortgage of land, purchase-money, or other, by the mortgagor or defendant personally liable for the mortgage-debt,

¹ Currie v. Cowles, 6 Bosw. 452. See Hall v. Gale, 14 Wisc. 54; Walker v. also Judah v. Trustees, &c., 16 Ind. 56. Wilson, 18 Wisc. 522; Lowry v. Hurd, 7

² Eaton v. Tallmage, 22 Wisc. 526, Minn. 356, 363; Coy v. Downie, 14 Flor. 528; Akerly v. Vilas, 21 Wisc. 88, 109; 544, 562.

and against whom a decree for a deficiency could be rendered : in respect to such defendants, both causes of action arise on contract, and the recovery on the counterclaim directly interferes with that on the complaint. In respect to other defendants who are not parties nor privies to the contract of mortgage, but whose liens, or incumbrances, or rights of property in the land are simply cut off by the decree, it may well be doubted whether the cause of action in the foreclosure suit can be said to arise on contract. This question was recently passed upon by the New York Court of Appeals ; and the doctrine above stated was fully sustained, and made the basis of decision.¹

IV. *Some Miscellaneous Provisions in Relation to Counterclaims.*

§ 804. As a counterclaim is always a separate and independent cause of action, which the defendant may enforce against the plaintiff, is he obliged to avail himself of it when sued ? Or may he omit to set up the demand in his answer, and make it the subject of another action brought by himself ? In other words, is the opportunity thus furnished by the codes to try and determine his own claim in the prior suit against himself a bar to his subsequently maintaining a second suit for the purpose of determining the issues which might have been so disposed of in the former one ? In the absence of statutory prohibition, no such effect is produced by the provisions of the codes which authorize the counterclaim. The defendant has an election. He may set up his cause of action as a counterclaim, and have both opposing demands adjudicated ; or he may withhold it, and prosecute it in a separate action brought for that purpose.² The codes of a few States expressly require the defendant's cross-right to be interposed as a counterclaim, if a proper one for that purpose ; and, if he fails to do so, he cannot enforce it by a direct action.³

§ 805. As to the form of the verdict, finding, and judgment,

¹ Hunt v. Chapman, 51 N. Y. 555, 557.
See also Charlton v. Tardy, 28 Ind. 452.

² Welch v. Hazelton, 14 How. Pr. 97 ;
Lignot v. Redding, 4 E. D. Smith, 235
Gillespie v. Torrance, 25 N. Y. 306, 308,
310, per Selden J. ; Bellinger v. Craigie,
81 Barb. 534, 539.

³ So in Minnesota, code, § 68 ; Lowry
v. Hurd, 7 Minn. 356, 363, per Atwater J.
" The defendants were not only at liberty
to set up this claim, but, by § 68, unless
they did so, they could not thereafter
maintain an action against the plaintiff on
such claim."

when a pecuniary counterclaim is alleged in the answer, and established by the proofs at the trial ; when the plaintiff's demand is proved and found by the jury or court, and the amount of the counterclaim as proved and found equals it, the verdict must be for the defendant, and a judgment rendered dismissing the action ; if the counterclaim as found be less than the plaintiff's demand as found, a verdict should be given for the plaintiff for the excess of his recovery over that of the defendant ; finally, if the counterclaim as found is greater than the plaintiff's demand as found, a verdict should be given for the defendant for the excess.¹ If the plaintiff should fail entirely to prove his cause of action as alleged, the defendant would be entitled to a verdict for the whole amount of his counterclaim as established by his proofs. The foregoing rules presuppose that both demands are for the recovery of money, either debt or damages. If the plaintiff's cause of action, or the counterclaim, is for the recovery of some special relief, legal or equitable, the judgment rendered must be according to the circumstances of the case. As has been shown in the foregoing citations, there may be instances in which it would be impossible for the defendant to take any thing by his counterclaim, unless the plaintiff's cause of action should be entirely defeated. There is a *dictum* in an Indiana case to the effect, that, where the action is for the recovery of money, a pecuniary counterclaim, less in amount than the sum demanded by the plaintiff, is inadmissible, because, as was said, it was not a complete bar or answer to the action.² This *dictum* was founded upon an entire misconception of the object and uses of the counterclaim. It is not, in any true sense, a defence in bar of the plaintiff's cause of action. It may be pleaded when the plaintiff's claim and right to recover *thereon* are admitted ; but, at the same time, it is alleged that the defendant has also a right on his side to recover a sum from the plaintiff upon an independent cause of action, which will equal, and so destroy, or exceed, or diminish the amount which would otherwise be the plaintiff's due. Undoubtedly, when the plaintiff's complaint shows that he is entitled to a certain sum, — say \$500, — and the defendant, not controverting these allegations by any defence in bar, simply interposes a distinct cross-demand for a less amount, — say \$300, —

¹ Moore v. Caruthers, 17 B. Mon. 669, 681; Hay v. Short, 49 Mo. 139, 142.

² McClintic's Administrator v. Cory, 22 Ind. 170, 178, per Worden J.

the plaintiff's right to a judgment for the difference is at once admitted; and the pleadings may be so framed, by the express provisions of some, if not all, of the codes, that he is immediately able to recover the sum so admitted upon the record, while the issues as to the remainder are left to be tried. To say that a defendant shall not avail himself of a smaller demand, and thus lessen the amount of the plaintiff's recovery, because he cannot allege facts which would defeat that recovery altogether, is as palpably unjust, and is warranted by no requirements of the statute.

§ 806. *Cross-complaints.* The practice in a few of the States admits a "cross-complaint" by a defendant, not only against the plaintiff, but against other defendants. Although there is a general similarity, if not substantial identity, in the provisions of the various codes concerning the granting of relief to defendants against the plaintiffs or against each other, yet a very great difference in the actual practice founded upon these provisions has grown up in the several States. In most of them, the clauses of the statute referred to are practically a dead letter; while in a few they have been accepted and acted upon according to their evident intent. A wide departure has thus been made in the latter commonwealths from the methods which prevailed before the introduction of the reformed procedure. This practice, in respect to cross-complaints against plaintiffs and against other defendants, will be best illustrated by a reference to the facts and decisions of a few prominent cases taken as examples. In an action brought by Joanna Morris against Thompson and Dice, the complaint alleged that the plaintiff, as widow of C. Morris, deceased, was owner in fee of certain land, namely, one undivided third of land, of which her husband died seized; that she was induced by the frauds of Thompson, in a manner particularly described, to execute to him a deed of all her said lands: a second paragraph states the same deed to have been made to Thompson by mistake; that the heirs of her husband also conveyed all their interest in the same land to T. at the same time, who thus held the title to the entire tract; that therefore T. conveyed five-sevenths of said tract to the defendant Dice, who took with knowledge of the plaintiff's claim; prayer, that her deed to Thompson might be declared void, that T's deed to D. might be set aside so far as it conveyed her land, that her title might be established, &c.

Dice answered, first, denials; and, second, that he took from T. in good faith, without notice, and for a full consideration. Thompson, as an answer, interposed a cross-complaint against Dice, in which, after denying any fraud, he alleged that he took a conveyance from the heirs of C. Morris, deceased, of all their interest, which was an undivided two-thirds of the tract; that by mistake his own deed to D. conveyed a greater interest in the land than that which the heirs of C. M. had owned, and which was all that he had intended to convey to D.; prayer, that his deed to D. might be reformed by correcting the mistake. Dice answered this cross-complaint, denying its averments. On the trial, D. moved for a separate trial of the issues between himself and T., which was refused. The court found from the evidence that the plaintiff's deed to T. was a mistake; that T. had reconveyed to her by quitclaim; that on the same day T. conveyed to D., and in that deed also there was a mistake, namely, that it conveyed five-sevenths of the whole tract instead of five-thirds of an undivided two-thirds, which was the amount intended to be conveyed; and a judgment was rendered reforming this deed from T. to D. On an appeal by D. from this judgment, the court held that the matters averred in the cross-complaint, and the relief sought by it, were so intimately connected with the subject of the principal suit by Mrs. Morris, that the whole might be properly litigated together; that the cross-complaint stated a good cause of action against D., and that the latter was not entitled to a separate trial of the issues raised by his answer to it.¹ It is plain, from the facts as they were found by the trial court, that the real object of the suit by Mrs. Morris was to get rid of Thompson's deed to Dice. Thompson's deed back to herself had purported to reconvey the title to her, but was partially inoperative by reason of the outstanding deed from Thompson to Dice, which was at least a cloud upon her title. By making both of these persons defendants, she forced Thompson to attack his own deed to Dice. As the matters of difference between Thompson and Dice were closely blended with her own claims against both, and as her remedy so directly depended upon the result of the contest between these two parties, it seems eminently proper that this triangular legal duel should be fought in one contest, as was done.

¹ Dice v. Morris, 82 Ind. 283.

§ 807. Another decision by the same court shows when a cross-complaint by defendants against other defendants, will not be sustained. Gasharie and Davis sue one hundred and seven defendants, partners trading under the name of "Farmers' Home Store," and seek to recover the amount of certain notes given by the firm for the price of goods sold on credit, amounting to several thousand dollars. The firm was an association having a president, directors, and members. The business was conducted by a managing agent, and overseen by the directors. One of the articles of association forbade the purchase or sale of goods on credit. The notes in suit were given by the managing agent for goods bought on credit. Twenty-eight of the defendants put in an answer by way of a cross-complaint against the directors and managing agent, who were also defendants. This pleading stated the articles of association, alleged a violation of them by the directors and managing agent in the said purchase upon credit, and prayed that the judgment in favor of the plaintiffs might be rendered against said directors and agent in the first instance, and enforced out of their property. The plaintiffs, and the directors and agent defendants, demurred to this cross-complaint. The court held that it stated no defence to the plaintiff's action, and presented no case for relief against the directors and agent. While the code provides that "judgment may be rendered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves," and while the court has thus the power to settle disputes between the defendants, it will not do so to the detriment of the plaintiff.¹

§ 808. The Code of Indiana expressly authorizes the court to determine the rights of the parties as between themselves on each side, when the justice of the case demands it. The mode of procedure is not pointed out, and therefore the general methods of chancery must be adopted, modified by the spirit of the code. When a defendant seeks relief against a defendant as to matters not appearing on the face of the original complaint, he must file a cross-complaint setting up the matters on which he relies, making as defendants thereto such of his codefendants and

¹ Manning v. Gasharie, 27 Ind. 399. See Indiana code (2 G. & H. 213), § 363.

others as are proper ; and process is necessary to bring them in. It is plain that there must be notice and process to the persons against whom relief is sought on the cross-complaint.¹ "The only real difference between a complaint and a cross-complaint is, that the first is filed by the plaintiff, and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of practice in the one case as in the other. When a defendant files a cross-complaint, and seeks affirmative relief, he becomes a plaintiff, and the plaintiff in the original action becomes the defendant in the cross-complaint."² The same rules as to setting out written instruments and copies thereof apply to cross-petitions which are prescribed in reference to original petitions. Where, however, the cross-petition is based upon a writing which it does not set out in full, but which is annexed to the petition in the action, this is sufficient; the rule is practically complied with.³ An answer being denominated a counterclaim by the pleader, cannot in California be treated as a cross-complaint.⁴

¹ *Fletcher v. Holmes*, 25 Ind. 458, 465, per *Frazer C. J.*; *Meredith v. Lackey*, 16 Ind. 1.

² *Ewing v. Pattison*, 35 Ind. 326, 330.

³ *Coe v. Lindley*, 32 Iowa, 487, 444; *Ryder v. Thomas*, 32 Iowa, 56.

⁴ *McAbee v. Randall*, 41 Cal. 136.

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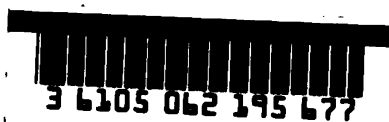
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